

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~713~~ 29

WILLIAM B. CAMMARANO AND LOUISE
CAMMARANO, HIS WIFE, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1958
CERTIORARI GRANTED MARCH 3, 1958

No. 15350

**United States
Court of Appeals**
for the Ninth Circuit

**WILLIAM B. CAMMARANO and LOUISE CAM-
MARANO, His Wife,**

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, for the
Western District of Washington, Southern Di-
vision

No. 1873

**WILLIAM B. CAMMARANO and LOUISE CAM-
MARANO, His Wife,**

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

I.

This is an action for recovery of income taxes alleged to have been erroneously or illegally assessed or collected. This Court has jurisdiction of such an action under Section 1346(A)(1) of Title 28, U.S.C.

II.

At all times herein mentioned, the plaintiffs were and now are husband and wife and citizens and residents of the State of Washington, residing at Tacoma, Pierce County.

III.

All of the income and property rights of the plaintiffs were and are of a community nature, and the claims herein asserted are the property of the community, representing taxes paid out of community funds.

IV.

For the calendar year 1948, plaintiffs filed a Federal Income Tax Return and the amount of tax due upon account thereof was duly and regularly paid in full. Said Return was subsequently audited by the Commissioner of Internal Revenue, and an additional tax in the amount of \$198.08 together with interest was assessed against the plaintiffs, and was by them paid.

V.

In the audit and subsequent assessment of additional tax, the Commissioner, among other things, disallowed as a deduction the sum of \$886.29, such amount being plaintiff's proportional share of \$3,545.15 paid by Cammarano Bros., a partnership, to the Trust Fund of the Washington Beer Wholesalers' Association, Inc. The disallowance of this sum as a deduction decreased the medical deduction allowable to plaintiffs by \$44.31. Thus, the disallowance of the payment to the Washington Beer Wholesalers' Association, Inc., increased plaintiffs' taxable income by \$930.60. This resulted in an increase of \$153.98 in the tax assessed against and collected from plaintiffs and the taxes of the plaintiffs were thus overpaid by such amount. The adjustments resulting in the additional amount of \$44.10 of assessment are not being contested.

VI.

Plaintiffs are members of a partnership operating under the trade name "Cammarano Brothers" of Tacoma, Washington. Part of the business

activity of Cammarano Brothers is the distribution of beer. Plaintiffs own a $\frac{1}{4}$ interest in the partnership, Cammarano Brothers. The partnership contributed \$3,545.15 during the year 1948 to the Washington Beer Wholesalers' Association, Inc., Trust Fund. The Trust Fund was established December 17, 1947, by the Washington Beer Wholesalers' Association, Inc., a corporation organized under the laws of the State of Washington, on February 6, 1934. The corporation was originally organized with the name, "Pacific Northwest Beverage Distributors, Inc.," under the provisions of Section 3888-3900, inclusive, of Remington's Revised Statutes of Washington, providing for non-profit corporations, and the corporation has continuously operated as such. The corporation was organized as a business or trade association, and its entire income is derived from dues and assessments paid by its members. Amended Articles of Incorporation, dated October 14, 1946, were filed in the Office of the Secretary of State, State of Washington, on November 14, 1946, and were duly recorded in Book 371, at pages 49 and 50 of Domestic Corporations. Under the amended Articles, the corporate name was changed to "Washington Beer Wholesalers' Association, Inc." The corporation was granted a tax exempt status by the Commissioner of Internal Revenue in a ruling dated September 3, 1937, and reconfirmed in a ruling dated June 15, 1949.

In a 30 day letter issued with reference to the partnership, Cammarano Brothers, on August 7,

1951, the Internal Revenue Agent in Charge of the Seattle Division of the Treasury Department, Internal Revenue Service, disallowed the payment of the \$3,545.15 to the Trust Fund of the Washington Beer Wholesalers' Association, Inc., as a business expense deduction to the partners. He indicated that the funds were expended for the purpose of defeating Initiative 13 and was, therefore, not deductible, citing Section 29.23(q)-1 of Regulations 111. This Section of Regulations 111 provides in part, "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income."

Under the laws of the State of Washington certain legislative powers are invested in the people as distinguished from the Legislature. Included in these powers are the powers reserved to the people under initiative provisions. These are provided in Amendment VII to the Washington State Constitution, which reads as follows:

"Art. 2 - § 1 Legislative Powers, Where Vested. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at

vs. United States of America

the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

“(a) Initiative: The first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measure shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the

legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law."

Initiative B3 was filed on August 23, 1946. The signature petitions were filed on January 23, 1947, and were found sufficient. The initiative was certified to the 1947 legislature, which took no action on it. The Washington legislature meets every two years and convened January 13, 1947, and adjourned March 13, 1947. The legislature was not in session during the balance of 1947 or during 1948. The initiative was then submitted to the people in the November 2, 1948, state general election, and the people voted it down.

The ballot title of Initiative 13 provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

The Washington State Beer Wholesalers' Association Trust Fund was set up with the limitation that it would only be expended in a program of acquainting the people with what the initiative meant, where it would lead to, and who were its backers, and it was expended for that purpose alone. The publicity program recommended the defeat of Initiative 13, but it was a program of education and not a program of influence such as is disapproved in Regulations 111. At no time did representatives of Washington State Beer Wholesalers' Association appear before the legislature in connection with Initiative 13, and no funds were expended in connection with any possible influence of the legislature in connection with Initiative 13. It was a program taken to the people and limited to that. Cammarano Brothers' contribution was entirely proper and is deductible for income tax purposes under the law and regulations including the cited Section of Regulations 111. The contribution was ordinary and necessary to the business of the co-partnership. Plaintiffs' proportional share of the contribution is also properly deductible.

VII.

On or about the 26th day of December, 1951, plaintiffs filed with the Director of Internal Revenue, a claim for refund on Form 843 asking for a refund of the overpayment mentioned in paragraph V above, a copy of which claim is hereto attached, marked Exhibit "A," and by this reference made a part hereof. Said claim has been neither allowed nor rejected, although more than six months have long since elapsed.

VIII.

By reason of the foregoing, plaintiffs are entitled to recover from the defendant on account of overpayment of income taxes for the calendar year 1948 the sum of \$153.98, together with interest thereon at the rate of 6% from the time payment of such amount was made.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of \$153.98, together with interest thereon at the rate of 6% per annum from the time such overpayment was made, and together with their costs and disbursements herein to be taxed.

/s/ A. R. KEHOE,

/s/ JONES & GREY,

Counsel for Plaintiffs.

Duly Verified.

EXHIBIT A

Claim

Form 843

U. S. Treasury Department

Internal Revenue Service

To Be Filed With the Director Where Assessment
Was Made or Tax Paid

District Director's Stamp: Filed 12/26/51.

The Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ Refund of Taxes Illegally, Erroneously or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: William
B. Cammarano & Louise.

Street address: 2307 "A" Street.

City, postal zone number, and State: Tacoma,
Washington.

1. District which return (if any) was filed:
Tacoma, Washington.

2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year) from
1/1, 1948, to 12/31, 1948.

3. Kind of tax: Income.
4. Amount of assessment, \$522.56; dates of payment, 1949, 1951.

* * *

6. Amount to be refunded: \$153.98.

* * *

The claimant believes that this claim should be allowed for the following reasons:

Amount of \$3,545.15 paid by Cammarano Bros., a partnership, to the Trust Fund of the Washington Beer Wholesalers' Association is an ordinary and necessary expense allowable under Section 23(a) of the I.R.C.

Taxpayers' proportionate share of the above deduction is \$886.29.

This claim is filed for protective purposes pending outcome of similar issue now present in the Northwest Division of the Technical Staff.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ WILLIAM B. CAMMARANO,

/s/ LOUISE CAMMARANO.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

ANSWER

The United States of America, the defendant above named, by Charles P. Moriarty, United States Attorney for the Western District of Washington answering the complaint herein respectfully alleges and shows:

1.

Admits the allegations of paragraph I.

2.

Is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph II.

3.

Is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph III.

4.

Denies the allegations of paragraph IV, but admits that plaintiffs filed an income tax return for 1948 and paid \$324.48 thereon, and that subsequent to an assessment of a deficiency by the Commissioner of Internal Revenue, plaintiffs paid an additional amount of \$229.97.

5.

Denies the allegations of paragraph V, but admits that "Cammarano Bros.," a partnership, contributed \$3,545.15 in 1948 to the Trust Fund of the Washington Beer Wholesalers' Association, Inc.,

and that plaintiffs claimed a portion of that amount as a deduction from their income in 1948, and on account of said claimed deduction plaintiffs paid said deficiency, and have contested said assessment to the extent of \$153.98.

6.

Denies that the said contribution or plaintiffs' share thereof was ordinary and necessary to the business of the partnership, or that it is deductible for income tax purposes under the law and regulations; and defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph VI, but it admits that plaintiffs own a one-fourth interest in a partnership in Tacoma, Washington, known as "Cammarano Brothers," part of whose business is the distribution of beer; and it admits that on August 7, 1951, the Acting Internal Revenue Agent in Charge in Seattle, Washington, for the Internal Revenue Service addressed to Cammarano Brothers notice of an adjustment of its net income for 1948 by additional income in the amount of \$4,451.40, a result in part of a report which found an unallowable deduction of a "dues and subscriptions expense" of \$3,545.15 for the said contribution, which was made for defeat of Initiative 13; and it admits that under the Constitution of the State of Washington the power of the initiative is one of the legislative powers reserved to the people of the State.

7.

Denies the allegations of paragraph VII, but ad-

mits that plaintiffs filed a claim for refund (Form 843) of \$153.98 with the Collector of Internal Revenue where the tax was paid, a facsimile of which is attached to the complaint and marked Exhibit "A" but no allegation of which is admitted to be true.

8.

Denies the allegations of paragraph VIII.

Wherefore, the United States of America demands judgment dismissing the action with costs.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ THOMAS R. WINTER,
Special Assistant to Regional
Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

DEFENDANT'S TRIAL MEMORANDUM

This is an action by plaintiffs, husband and wife, in which they seek refund of federal income taxes for the year 1948 in the amount of \$153.98, with interest.

Question Presented

Whether amounts paid to a special fund set up to finance a publicity program urging defeat of an

Initiative are deductible from gross income as "ordinary necessary expenses paid or incurred during the taxable year in carrying on" plaintiffs' business, within the meaning of Section 23(a)(1)(A), Internal Revenue Code of 1939.

Statute and Regulation Involved

Internal Revenue Code of 1939:

Sec. 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

• (a) Expenses.

(1) Trade or business expenses.

(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *

(26 U.S.C. 1948 Ed., Sec. 23.)

Treasury Regulations III, promulgated under the Internal Revenue Code:

Sec. 29.23(o)-1. Contributions or Gifts by Individuals.

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

Statement

The admitted facts and evidence will show that plaintiffs were partners in a firm, Cammarano Brothers, which was engaged during the year in question in the wholesale distribution of beer. The partnership belonged to the Washington Beer Wholesalers Association, Inc., a business league ruled exempt from corporate income tax by the Internal Revenue Service.

During that year, the Association and other interested groups established a special committee to carry out a publicity campaign urging defeat of Initiative 13, which was to be voted on by the people of Washington at the general election in November. The Association established a special fund to finance its share of the campaign, and Cammarano Brothers made payments to that fund. Plaintiffs sought to deduct their share of such payments, in determining their net taxable income for the year. The Commissioner disallowed the claimed deduction, and plaintiffs paid additional tax, refund of which they seek in this action.

Jurisdiction of the action lies in the Court by virtue of 28 U.S.C. Section 1346.

Argument

In support of their claim, plaintiffs argue that the payments in question were to a tax-exempt association, and used exclusively to present to the public their position with respect to legislation

which would affect their business, and which was to be voted on by the public rather than elected representatives in the legislature.

Concededly, Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely. That without more would make the payments capital items, deductions for which cannot be claimed under our system of annual computation of net income for tax purposes. See, e.g., *Welch v. Helvering*, 290 U.S. 111.

However, it is clear that the payments were not to the Association as such. They were solicited, handled and used in a manner and for a purpose separate and distinct from the ordinary activities of the Association. Had it been otherwise, the whole exemption of the Association would have been jeopardized. See, e.g., *McClintock-Trunkey Co. v. Commissioner*, 19 T. C. 297.

In any event, plaintiffs' claim comes too late. It has long been established that payments for information or publicity aimed at securing the defeat of legislation are not deductible, however justified or salutary the purpose may be. Such payments fall squarely within the ruling of the Court of Appeals for the Ninth Circuit in *Old Mission P. Cement Co. vs. Comm'r*, 69 F. 2d 676, and the ruling of the Internal Revenue Service which has been in the form set out above substantially since 1915 and which has been followed and applied repeatedly. See, e.g., *Textile Mills S. Corp. v. Comm'r*, 314

U.S. 326; *Sunset Scavenger Co. v. Comm'r.*, 83 F. 2d 453 (CA 9th, 1936); *Roberts Dairy Co. v. Comm'r.*, 195 F. 2d 948 (CA 8th, 1952); *American Hardware & Eq. Co. v. Comm'r.*, 202 F. 2d 126 (1st, 137 F. Supp. 293 (D. Mass., 1955)).

Plaintiff's payments are within these rulings. They were for the "defeat of legislation" and for "advertising other than trade advertising." It makes no difference that the publicity campaign was aimed at the public, or that the legislation was to be enacted by the public rather than representatives. Just such a situation was involved in four of the cited cases. In the other two, *Textile Mills* and *Sunset Scavenger*, the campaigns were, in part at least, aimed at the public.

Conclusion

For the foregoing reasons, plaintiffs' action should be dismissed.

Respectfully submitted,

CHARLES K. RICE,

Acting Assistant Attorney
General;

ANDREW D. SHARPE,

KURT W. MELCHIOR,

THEODORE D. TAUBENECK,

Attorneys, Department of
Justice;

CHARLES P. MORIARTY,
United States Attorney;

GUY A. B. DOVELL,
Assistant United States
Attorney.

March, 1956.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiffs were represented by Jones & Grey and A. R. Kehoe, and the defendant by its attorney of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. This is an action for recovery of income taxes alleged to have been erroneously or illegally assessed and collected. This Court has jurisdiction of such an action under Section 1346(A)(1) of Title 28, U. S. C.

2. At all times herein mentioned, the plaintiffs were, and now are, husband and wife and citizens and residents of the State of Washington, residing at Tacoma, Pierce County, Washington. The claim herein asserted is community property of plaintiffs.

3. For the calendar year 1948, plaintiffs filed a timely Federal Income Tax Return and paid the

tax shown due thereon in the amount of \$324.48. The return was subsequently audited by the Commissioner of Internal Revenue and an additional tax in the amount of \$198.08 was assessed against plaintiffs and plaintiffs paid such deficiency, together with interest of \$31.89 on October 16, 1951. On the 29th day of December, 1951, plaintiffs filed with the Collector of Internal Revenue at Tacoma, Washington, a claim for refund on Form 343, a facsimile of which is attached to the complaint herein, said claim relating to the year 1948 and asking for a refund of \$153.98. The claim had neither been allowed or rejected on March 15, 1955, and on that date the action herein was filed. Plaintiffs' original return had been filed with the Collector of Internal Revenue at Tacoma, Washington.

4. Plaintiff husband, William B. Cammarano, was a member of a partnership operating under the trade name "Cammarano Brothers" in Tacoma, Washington. Plaintiffs own a one-fourth interest in the partnership. Part of the business activity of the partnership is the wholesale distribution of beer.

5. The partnership "Cammarano Brothers" paid \$3,545.15 during the year 1948 to the Washington Beer Wholesalers Association, Inc., Trust Fund. The payments were made as follows: Check No. 35552 dated July 2nd, 1948, in the amount of \$948.58; Check No. 36375 dated September 21, 1948, in the amount of \$1,133.57; Check No. 36786 dated November 4, 1948, in the amount of \$887.88; Check No. 37239 dated December 29, 1948, in the amount

of \$575.12. Plaintiffs' proportionate share of such partnership contribution was \$886.29. The Commissioner of Internal Revenue disallowed the \$886.29 as a deduction by plaintiffs in their income tax return and if the Court holds for the plaintiffs they will be entitled to a refund of \$153.98 for the year 1948 together with interest and costs as may be fixed by the Court.

6. The Washington Beer Wholesalers Association, Inc., Trust Fund was established December 17, 1947, by the Washington Beer Wholesalers Association Inc., a non-profit trade association corporation organized under the laws of the State of Washington on February 6, 1934. The corporation was originally organized under the name Pacific Northwest Beverage Distributors, Inc., under the provisions of Section 3888-3900, inclusive, of Remington's Revised Statutes of Washington. Amended Articles of Incorporation dated October 14, 1946, were filed in the office of the Secretary of State of the State of Washington on November 14, 1946, providing for a change in the corporate name of the corporation to Washington Beer Wholesalers Association, Inc. The corporation was recognized as exempt from Federal income tax in a ruling of the Commissioner of Internal Revenue dated September 3rd, 1937, and reconfirmed in a ruling dated June 15, 1949.

7. In the November 2, 1948, Washington State General Election, Initiative to the Legislature No. 13 was submitted to a vote of the people and was

voted down. The Initiative measure had been filed with the Secretary of State of the State of Washington on August 23, 1946. The signature petitions were filed January 3, 1947, and were found sufficient. The Initiative was certified to the 1947 Legislature which took no final action upon it. The Initiative was then submitted to the November 2, 1948, state general election. The Washington Legislature meets every two years. It convened January 13, 1947, and adjourned March 13, 1947. It was not in session during the balance of 1947 or during 1948. The ballot title of the Initiative provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

8. The trust fund was set up by the Washington State Beer Wholesalers Association, Inc., to help finance a publicity program on the Initiative. The publicity program urged the defeat of the Initiative and was carried out by an informal committee created by beer and wine dealers, grocers and other interested parties. In less than one year, by assessment and otherwise, the Beer Wholesalers Association obtained for its trust fund \$62,064.19.

Plaintiffs' Contentions

Plaintiffs claim the right to deduct their contribution to the Washington Beer Wholesalers As-

sociation, Inc. Trust Fund under Section 23(a)(1) of the Internal Revenue Code of 1939, as amended, as an ordinary and necessary expense paid during the taxable year in carrying on their trade or business and/or under Section 23(o)(2) as a contribution to a corporation organized under the laws of the State of Washington, organized and operated as a business league not operated for profit and no part of the net earnings of which inures to the benefit of any shareholder or individual qualifying under Section 101(7) of the Internal Revenue Code of 1939, as amended.

Defendant's Contentions

Plaintiffs' contribution does not qualify as a deduction either under Section 23(a)(1) or 23(o)(2) of the Internal Revenue Code of 1939, as amended.

Issues of Fact

The following are the issues of fact to be determined by the Court:

1. Was plaintiffs' contribution an ordinary and necessary expense paid during the taxable year in carrying on plaintiffs' trade or business?

2. Was a substantial part of the activities of the fund to which plaintiffs contributed the carrying on of propaganda or otherwise attempting to influence legislation?

3. Was any of the contribution expended for lobbying purposes, the promotion or defeat of legis-

lation, or the exploitation of propaganda, including advertising other than trade advertising?

Issues of Law

The following are the issues of law to be determined by the Court. Is plaintiffs' contribution deductible under Section 23(a)(1) and/or Section 23(o)(2) of the Internal Revenue Code of 1939, as amended?

Exhibits

Photostatic copies of the exhibits of all parties below listed were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. The parties shall not be precluded from offering additional exhibits for good cause shown for the withholding or delay in presentation thereof.

Plaintiffs' Exhibits

1. Articles of Incorporation of Pacific Northwest Beverage Distributors, Inc.
2. Resolution and Bank Authorization of Washington Beer Wholesalers Association, Inc., Trust Account.
3. Initiative to the Legislature No. 13.
4. Treasury Department letter dated June 15, 1949.

5. Resolution and Bank Authorization furnished the Seattle-First National Bank.

6. Secretary of State's Pamphlet on Initiative 13.

7. Reproductions of some advertisements of Initiative 13.

Defendant's Exhibits

1. 1948 Return of William B. and Louise Cammarano.

2. Citizens Liquor Control Council, Inc., advertisement on Initiative 13.

3. Washington Beer Wholesalers Assn., Inc., bulletin of November 20, 1947, and supplement.

4. Authorization for Signing and Indorsing Checks of Industry Advisory Committee Fund.

5. Statement of Cash Receipts and Disbursements, Industry Advisory Committee.

The foregoing Pretrial Order has been approved by the parties hereto, as evidence by the signatures of their counsel hereon, and upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by agreement of the parties and approval of the Court.

Dated at Tacoma, Washington, this 17th day of March, 1956.

/s/ GEORGE H. BOLDT,

United States District Judge.

Approved:

/s/ A. R. KEHOE,
Attorney for Plaintiffs.

/s/ T. D. TAUBENECK,
Assistant United States At-
torney.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

ORAL DECISION

March 19, 1956

Boldt, District Judge:

Whatever doubt there may have been about the meaning and application of Treasury Regulation 111 § 29.23(o)-1 when it was first adopted some twenty years ago, and for some time thereafter, there does not seem to be much room for doubt about it now in the light of all of the cited decisions construing and applying the regulation. *Textile Mills Corp. v. Commissioner*, 314 U.S. 326; *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676 (CA 9th); *Sunset Scavenger Co. v. Commissioner*, 83 F. 2d 948 (CA 9th); *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (CA 8th); *American Hardware & Eq. Co. v. Commissioner*, 202 F. 2d 126 (CA 4th); *Revere Racing Association v. Scanlon*, 137 Fed. Supp. 293 (D.C. Mass.).

This regulation has been held to have the force of law just as though it were a statute, and the regulation in brief says that sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

It will be observed that several different categories of expenses are referred to. Lobbying expense is one, sums expended for the promotion or defeat of legislation is another, the exploitation of propaganda is a separate category, and so on. Under the cases construing this language, particularly the Ninth Circuit case, *Sunset Scavenger Co. v. Commissioner*, *supra*, the meaning of the regulation as applied to the facts of this case is clear. In Webster's International Dictionary and in "Words and Phrases," the meaning of the word "legislation" is given as having to do with the making of laws, however made. There are many decisions to such effect. In other words, the making of laws is legislation whether the laws are made by a sovereign ruler, a city council, county commissioners, a state legislature, Congress, or by the people directly through an initiative or referendum measure.

In applying the regulation there is no rational basis for making a distinction between sums of money spent for the purpose of influencing the public in their action on an initiative measure and

sums spent with the object of influencing members of the legislature with respect to pending legislation. There certainly is not any ground for making that distinction in the language of the Treasury regulation. The regulation flatly says that sums of money expended for the promotion or defeat of legislation are not deductible from gross income. An initiative measure is just as much legislation as an act of a legislature or any other enactment of law.

It is admitted in the record that the sums here in question were spent by the taxpayer for the purpose of defeating the enactment of certain legislation by initiative and that being so, those sums are not deductible from gross income. This is not to indicate that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for having spent the money to defeat the legislation by fair publicity. They had a right to do that and propriety of expenditures therefor is not in question. But that has nothing whatever to do with whether the sums so spent by the taxpayer are deductible for income tax purposes. In that

matter the regulation is controlling and clearly requires judgment in favor of defendant. So ordered.

GEORGE H. BOLDT, -

United States District Judge.

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Court at Tacoma, Washington, on March 19, 1956. Plaintiffs were represented by Jones and Grey and Adlore R. Kehoe and Hargrave A. Garrison, II, and defendant was represented by Charles P. Moriarty, Esq., United States Attorney; Guy A. B. Dovell, Esq., Assistant United States Attorney, and Kurt W. Melchior and Theodore D. Taubeneck, Esqs., Attorneys, Department of Justice, Washington 25, D. C.

The Court, having considered the pretrial order heretofore entered, the evidence and exhibits adduced by the parties, and the arguments of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its conclusions of law as follows:

Findings of Fact

1. At all times material, plaintiffs were husband and wife, residing in the State of Washington. As such they filed their joint income tax return for the year 1948 with the Collector of Internal Revenue for the District of Washington and paid the tax shown thereon to be due.

2. Thereafter, the Commissioner of Internal Revenue caused an examination of that return to be made, and upon audit assessed against plaintiffs a deficiency in income tax for that year in the amount of \$198.08, with interest, all of which plaintiffs paid to said Collector on October 16, 1951.

3. Thereafter, plaintiffs filed a timely claim for refund of said deficiency payment, and more than six months later they commenced this action to recover said payment, with interest.

4. At all times material, plaintiffs owned a one-fourth interest in a partnership carrying on wholesale distribution of beer under the trade name "Cammarano Brothers" in Tacoma, Washington.

5. During 1948, the partnership paid \$3,545.15 to the Washington Beer Wholesalers Association, Inc., Trust Fund, plaintiffs' proportionate share of such payments being \$886.29. The Trust Fund had been established on December 17, 1947, by the Association of which the partnership was a member, to help finance an extensive state-wide publicity program on the part of wholesale and retail beer and wine dealers.

6. This publicity program urged the defeat of Initiative to the Legislature No. 13, which was submitted to the people of Washington in accordance with the legislation provisions of the State Constitution at the general election on November 2, 1948. That Initiative would have placed the retail sale of wine and beer exclusively in state-owned and operated stores. The ballot title of the Initiative provided:

“An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties.”

7. The initiative measure had been filed with the Secretary of State of the State of Washington on August 23, 1946. The signature petitions were filed January 3, 1947, and were found sufficient. The initiative was certified to the 1947 Legislature which took no final action upon it. The initiative was then submitted to the November 2nd, 1948, state general election. The Washington Legislature had convened January 13, 1947, and adjourned March 13, 1947, and was not in session during the balance of 1947 or during 1948.

8. With the measure going before the people, the wholesale and retail wine and beer dealers decided to undertake a vast publicity program aimed at the people, who were to vote on the measure in November, 1948. It was decided that the program

should be directed by a committee made up from the various groups and associations interested in defeat of the measure, and financed by contributions from those groups and associations and other interested parties. An Industry Advisory Committee was established to direct the program, in support of which it was furnished with \$231,257.10. Of that amount, \$53,500.00 came from the Beer Wholesalers Association, which collected the money by assessing its members amounts based upon their volume of business. The collections were handled through a Trust Fund which was established as a separate entity to receive and disburse the assessments. The program was carried out by various types of advertising.

9. The evidence shows that if the initiative measure had been passed, many of the members of the Washington State Beer Wholesalers' Association would have been put out of business and for that reason the expenditure by them was an ordinary and necessary business expense. In any event, the initiative measure was defeated.

10. As early as September 3, 1937, the Commissioner of Internal Revenue ruled that the Beer Wholesalers' Association was itself exempt from federal income tax. During the period of the publicity program, that Association continued its usual activities, and collected its usual dues from its members, including Cammarano Brothers.

11. The payments made to the Trust Fund by Cammarano Brothers were for purposes of in-

fluencing the defeat of the initiative measure. There was nothing wrong or evil or corrupt about spending money for this purpose. The expenditure of money to enlighten and inform the public with respect to initiative measures is a perfectly proper activity and a laudable activity, as a matter of fact. When the general public is going to be called upon to enact or refuse to enact legislation, the more information it can be given and the more widespread it is given, the better. Neither this taxpayer nor the Washington Brewers' Institute nor the industry are in any manner whatever to be criticized for having spent the money to defeat the initiative measure. They had the right to do that. But that has nothing whatever to do with whether the sums they spent are deductible for income tax purposes. There we are controlled by this Regulation which provides in brief that sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income. The Regulation has been in effect for some twenty years and has been held to have in effect the force of law just as though it were a statute. The Regulation flatly states that sums of money expended for the promotion or defeat of legislation are not deductible from gross income. An initiative measure, such as is involved here, is legislation just as much as an act of the Legislature. In the light of all of the cases that have come down construing this language, and particularly our own Ninth

Circuit case, the Sunset Scavenger Company case, decision will be entered in favor of the defendant.

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matter of this action.

2. Plaintiffs contend that the amount paid by Cammarano Brothers to the Trust Fund should have been allowed by the Commissioner as an "Ordinary and necessary expense paid or incurred during the taxable year in carrying on" its business of the wholesale distribution of beer, under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 Ed., Sec. 23). But it is clear that the payment to the Trust Fund was aimed at the defeat of legislation. For this reason, and without in any way condemning the stand taken in the campaign, the payment is not deductible under that Section, according to long-standing Treasury Regulations (T.R. 111, Sec. 29.23(o)-1) and a host of judicial decisions. See, e.g., *Textile Mills Corp. v. Commissioner*, 314 U.S. 326; *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676 (CA 9th); *Sunset Scavenger Co. v. Commissioner*, 83 F. 2d 948 (CA 9th); *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (CA 8th); *American Hardware & Eq. Co. v. Commissioner*, 202 F. 2d 126 (CA 4th); *Revere Racing Association v. Scanlon*, 137 F. Supp. 293 (DC Mass.). Plaintiffs make much of the fact that the instant publicity campaign was aimed at the people generally rather

than the legislature, but no such distinction is recognized by the cited cases nor does it commend itself to reason. Certainly publicity can be directed at legislators both directly and indirectly. But more important for purposes of this case, the measure at which the instant campaign was aimed was clearly legislation, albeit subject to enactment by the people generally rather than members of a legislature.

3. Plaintiffs are not entitled to a refund of their 1948 income taxes, and their complaint must be dismissed. Judgment may be entered accordingly.

Done in Open Court at Washing-
ton, this day of 1956.

.....
United States District Judge.

Presented and approved by:

/s/ A. R. KEHOE,

Attorney for Plaintiffs.

Copy Received: 6/13/56.

/s/ GUY A. B. DOVELL,

Assistant United States At-
torney.

Lodged June 13, 1956.

[Title of District Court and Cause.]

**PLAINTIFFS' OBJECTIONS TO DEFEND-
AND'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Plaintiffs object to the following proposed Findings of Fact and Conclusions of Law on the grounds that each thereof is contrary to and unsupported by the evidence in this case.

I.

Defendant's proposed Finding of Fact No. 7, should be stricken in its entirety and plaintiffs' proposed Finding of Fact No. 7 should be inserted in lieu thereof. Plaintiffs' proposed Finding of Fact is taken in its entirety from the admitted facts in the pretrial order herein.

II.

The words "none of which had reference to the wares of members of the Association" at the end of defendant's proposed Finding No. 8 should be stricken and a period should be inserted after the word "advertising" where a comma is now indicated.

III.

Defendant's proposed Finding of Fact No. 9 should be stricken in its entirety and there should be inserted in lieu thereof plaintiffs' proposed Finding of Fact No. 9. Mr. Chester A. Adwen, Secretary of the Washington Beer Wholesalers As-

sociation, testified that if the initiative had passed, 90% of the beer wholesalers would have been put out of business. Tr. page 31. The Court of Appeals for the Seventh Circuit succinctly stated the principle applicable in the case of *Heininger v. Commissioner*, 133 F. (2d) 567, at 569 as follows:

"Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary."

IV.

Defendant's proposed Finding of Fact No. 11 should be stricken in its entirety and there should be inserted in lieu thereof plaintiffs' proposed Finding No. 11 which is taken practically verbatim from the oral decision of the Court herein.

V.

Defendant's Conclusion of Law No. 2 should be amended by striking the word "perfectly" in line 3 of page 4, and striking the words "entirely for propaganda" in line 4 of page 4, and striking the words "both of these reasons" in line 5 of page 4 and inserting in lieu of the latter the words "this reason." These changes will correct defendant's allegation that the expenditures were entirely for propaganda.

Respectfully submitted,

/s/ A. R. KEHOE,

Counsel for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

OFFER OF PROOF

For purposes of completing the record in this case and in accordance with the Court's statement that plaintiffs should have full opportunity to make a record on the question of relevancy of the material covered by the Interrogatories propounded in this case, plaintiffs make the following offer of proof to be added to the record in this case in the event an appeal is involved.

It is the plaintiffs' position that the Commissioner of Internal Revenue himself has recognized in rulings that where a publicity program is taken to the people and no legislators are involved, expenditures in connection with such publicity program are deductible.

On or about September 25, 1950, the J. W. Jackson Beverage Company of Fayetteville, Inc., Fayetteville, North Carolina, filed a Protest covering the fiscal year ending February 28, 1949, of the company with P. M. Sawyer, Internal Revenue Agent in Charge, Greensboro, North Carolina. The

Protest covered a proposed disallowance of an item of \$2,682.50 as a deduction, stating in part as follows:

"The laws in North Carolina with respect to the sale of malt beverages provide for a county option, and the process of determining whether or not the sale of the malt beverage is legal, is dependent upon an election by the people. The expenditures made by this company were made at a time which the Legislature of North Carolina was not in session, and were made for the purpose of protecting the business of this corporation, and not for the purpose of defeating or promoting legislation.

"The sum of \$2,682.50 paid by the taxpayer to the North Carolina Beer Distributors Association, Cape Fear Malt Beverage Association, and Cumberland County Malt Beverage Association was for the purpose of protection, with the hope of insuring the continued operation of the business. In the first county elections, in Cumberland, Columbus and Bladen Counties the elections were lost and it was necessary that our office and warehouse located at Fayetteville be closed, however, through hard work and by the payment of necessary expenses in connection therewith, including the pooled resources of the several members of the several associations, the City of Fayetteville and the Town of Whiteville, North Carolina, in a separate authorized election voted for the legal sale of beer within the City and Town limits, enabling us to reopen our office and warehouse and to continue in business. This could

not have been done without the co-operative efforts of the several dealers in the area and through the associations to whom the subscriptions and dues were paid.

“Your attention is called to the ruling made by the Bureau of Internal Revenue, Washington, D. C., in connection with ‘Colorado United, Inc.,’ in which the Internal Revenue Agent in Charge at Denver had disallowed a deduction for payments made to the Association Colorado United, Inc., an organization formed for the purpose of combatting the efforts of prohibitionists to destroy the alcoholic industry in Colorado and the Nation. The taxpayer making the payment to the association ‘Colorado United, Inc.,’ was a wholesale beer distributor. The Bureau of Internal Revenue in Washington has ruled, and has so directed the Internal Revenue Agent in Charge, that anyone financially interested in the alcohol beverage industry in Colorado, who makes payments of that nature and for the purpose of defeating the prohibitionists, will be allowed a deduction from gross income, for such payments in determining the taxable income of the taxpayer, as an ordinary and necessary business expense under Section 23(A) (1) (A) of the Internal Revenue Code.

“In addition to the ruling made by the Bureau of Internal Revenue in Washington with respect to payments made to associations for the purpose cited, the taxpayer calls to your attention the following case decided in favor of the taxpayer:

"Luther Ely Smith v. Comm. of Internal Revenue, 3 TC 92, Docket #109631, promulgated May 1, 1944;

"The taxpayer contributed \$2,500.00 to the Missouri Institute for the Administration of Justice, an organization having for its immediate purpose the establishment by constitutional amendment of a new modified appointive system for the selection of judges to take the place of selection by primary and general election. * * * 'Petitioner was motivated in making this contribution by civic consideration and also by a desire to protect and improve the practice of law in which he was engaged' * * * The Tax Court held that the expenditure (contribution) was deductible as an ordinary and necessary business expense. 'The petitioner made the contribution in the belief that the reform resulting from the adoption of the sponsored amendment would benefit the legal profession generally, and his own practice specifically' * * *

"It is respectfully requested that this matter be referred to the Bureau of Internal Revenue in Washington for a specific ruling on the question, * * *

"The Office of the Internal Revenue Agent in Charge acknowledged receipt of the Protest on September 25, 1950, and, on October 13, 1950, advised taxpayer as follows:

"Consideration has been given to your protest dated September 21, 1950, to the proposed change in

your federal income tax liability for the fiscal year ended February 28, 1949. In accordance with your request, the file in this case has been transferred to the Bureau of Internal Revenue at Washington, D. C., for advice, and in event an adverse decision is indicated on the basis of the record in this case, you will be granted a hearing in Washington before a representative of the Deputy Commissioner of the Income Tax Unit."

On December 8, 1950, the Office of the Internal Revenue Agent in Charge advised taxpayer by letter that taxpayer's position on the \$2,682.50 item was conceded and there was enclosed a recomputation of taxpayer's tax liability for the fiscal year ended February 28, 1949, allowing the item as a deduction in full.

The Commissioner acquiesced in the Luther Ely Smith decision, 3 T.C. 696, in 1944 C.B. 26.

/s/ JONES & GREY,

/s/ A. R. KEHOE,

Attorneys for Plaintiffs.

[Endorsed]: Filed July 30, 1956.

[Title of District Court and Cause.]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This cause came on for trial before the Court at Tacoma, Washington, on March 19, 1956. Plaintiffs

were represented by Jones and Grey and Adlore R. Kehoe, Esqs., and defendant was represented by Charles P. Moriarty, Esq., United States Attorney; Guy A. B. Dovell, Esq., Assistant United States Attorney, and Kurt W. Melchior and Theodore D. Taubeneck, Esqs., Attorneys, Department of Justice, Washington 25, D. C.

The Court, having considered the pretrial order heretofore entered, the evidence and exhibits adduced by the parties, and the arguments of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its conclusions of law as follows:

Findings of Fact

1. At all times material, plaintiffs were husband and wife, residing in the State of Washington. As such they filed their joint income tax return for the year 1948 with the Collector of Internal Revenue for the District of Washington and paid the tax shown thereon to be due.

2. Thereafter, the Commissioner of Internal Revenue caused an examination of that return to be made, and upon audit assessed against plaintiffs a deficiency in income tax for that year in the amount of \$198.08, with interest, all of which plaintiffs paid to said Collector on October 16, 1951.

3. Thereafter, plaintiffs filed a timely claim for refund of said deficiency payment, and more than six months later they commenced this action to recover said payment, with interest.

4. At all times material, plaintiffs owned a one-fourth interest in a partnership carrying on wholesale distribution of beer under the trade name "Cammarano Brothers" in Tacoma, Washington.

5. During 1948, the partnership paid \$3,545.15 to the Washington Beer Wholesalers Association, Inc., Trust Fund, plaintiffs' proportionate share of such payments being \$886.29. The Trust Fund had been established on December 17, 1947, by the Association of which the partnership was a member, to help finance an extensive statewide publicity program on the part of wholesale and retail beer and wine dealers.

6. This publicity program urged the defeat of Initiative to the Legislature No. 13, which was submitted to the people of Washington in accordance with the legislation provisions of the State Constitution at the general election on November 2, 1948. That Initiative would have placed the retail sale of wine and beer exclusively in state-owned and operated stores. The ballot title of the Initiative provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

7. The measure had previously been submitted to the state legislature. An officer of the Beer Wholesalers Association kept close track of its

progress, and personally contacted many of the legislators, urging defeat. The legislature did not act on the measure.

8. With the measure going before the people, the wholesale and retail wine and beer dealers decided to undertake a vast publicity program aimed at the people, who were to vote on the measure in November, 1948. It was decided that the program should be directed by a committee made up from the various groups and associations interested in defeat of the measure, and financed by contributions from those groups and associations and other interested parties. An Industry Advisory Committee was established to direct the program, in support of which it was furnished with \$231,257.10. Of that amount, \$53,500.00 came from the Beer Wholesalers Association, which collected the money by assessing its members amounts based upon their volume of business. The collections were handled through a Trust Fund which was established as a separate entity to receive and disburse the assessments. The program was carried out by various types of advertising none of which had reference to the wares or members of the Association as such.

9. There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear. In any event, the measure was defeated.

10. As early as September 3, 1937, the Commissioner of Internal Revenue ruled that the Beer Wholesalers Association was itself exempt from federal income tax. During the period of the publicity program, that Association continued its usual activities, and collected its usual dues from its members, including Cammarano Brothers.

11. The payment made to the Trust Fund by Cammarano Brothers was for propaganda and was to defeat legislation, and therefore was neither ordinary nor necessary to the usual course of the partnership business. There was nothing wrong or evil or corrupt about spending money for this purpose. Expenditures to enlighten and inform the public with respect to initiative measures are perfectly proper and laudable.

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matter of this action.

2. Plaintiffs contend that the amount paid by Cammarano Brothers to the Trust Fund should have been allowed by the Commissioner as an "Ordinary and necessary expense paid or incurred during the taxable year in carrying on" its business of the wholesale distribution of beer, under Section 23(a) (1) (A) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 Ed., Sec. 23). But it is perfectly clear that the payment to the Trust Fund was entirely for propaganda, and aimed at the defeat of legislation. For both of these reasons, and without

in any way condemning the stand taken in the campaign, the payment is not deductible under that Section, according to long-standing Treasury Regulations (T.R. 111, Sec. 29.23 (o)-1) and a host of judicial decisions. See, e.g. *Textile Mills Corp. v. Commissioner*, 314 U.S. 326; *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676 (CA 9th); *Sunset Scavenger Co. v. Commissioner*, 83 F. 2d 948 (CA 9th); *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (CA 8th); *American Hardware & Eq. Co. v. Commissioner*, 202 F. 2d 126 (CA 4th); *Revere Racing Association v. Scanlon*, 137 F. Supp. 293 (DC Mass.). Plaintiffs make much of the fact that the instant publicity campaign was aimed at the people generally rather than the legislature, but no such distinction is recognized by the cited cases nor does it commend itself to reason. Certainly publicity can be directed at legislators both directly and indirectly. But more important for purposes of this case, the measure at which the instant campaign was aimed was clearly legislation, albeit subject to enactment by the people generally rather than members of a legislature.

3. Plaintiffs are not entitled to a refund of their 1948 income taxes, and their complaint must be dismissed. Judgment may be entered accordingly.

Done in Open Court at Seattle, Washington, this 24th day of July, 1956.

-/s/ GEORGE H. BOLDT,

United States District Judge.

Presented and approved by:

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ THEODORE D. TAUBENECK,
S.A.D.

Attorney, Tax Division,
Attorneys for Defendants.

Copy received:

/s/ A. R. KEHOE,

/s/ JONES & GREY,
Attorneys for Plaintiffs.

Lodged: June 13, 1956.

[Endorsed]: Filed July 30, 1956.

United States District Court, Western District
of Washington, Southern Division

No. 1873

WILLIAM B. CAMMARANO and LOUISE CAM-
MARANO, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The Court having considered the evidence and the
arguments of counsel and entered its Findings of

Fact and Conclusions of Law herein, it is in conformity therewith

Ordered, Adjudged and Decreed that the plaintiffs take nothing from the defendant, and that their action be and it hereby is dismissed with prejudice, and that the defendant have and recover its costs herein from the plaintiff.

Done in Open Court at Seattle, Washington, this 24th day of July, 1956.

/s/ GEORGE H. BOLDT,
United States District Judge.

Presented and approved by:

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ THEODORE D. TAUBENECK,
S.A.D.
Attorney, Dept. of Justice,
Attorneys for Defendants.

Approved as to form:

/s/ A. R. KEHOE,
Attorneys for Plaintiffs.

Lodged: June 13, 1956.

[Endorsed]: Filed July 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that William B. Cammarano and Louise Cammarano, his wife, plaintiffs above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the final Judgment dated July 24, 1956, and filed in the above-entitled Court on July 24, 1956.

Dated this 6th day of September, 1956.

/s/ A. R. KEHOE,

Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed September 6, 1956.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1873

**WILLIAM B. CAMMARANO, and LOUISE
CAMMARANO, His Wife,**

Plaintiffs.

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings in the above-entitled
and numbered cause, before the Honorable George

H. Boldt, United States District Judge, Federal Building, Tacoma, Washington, on the 19th day of March, 1956.

Appearances:

**HARGRAVE A. GARRISON, ESQ., and
A. R. KEHOE, ESQ., of
JONES & GREY,**

Appeared on Behalf of the Plaintiffs.

**KURT W. MELCHIOR, ESQ., and
T. D. TAUBENECK, ESQ.,**

Appeared on Behalf of the Defendant.

(Whereupon, the following proceedings were had, to wit:)

Mr. Kehoe: The first matter in the Cammarano case involves a question of objections to certain interrogatories and with your Honor's permission I would like to handle those in the opening statement because they are a rather integral part of the opening statement.

The Court: One thing I was going to suggest to you, Mr. Kehoe, if you have any witnesses who would be accommodated by testifying before the lunch period I'd be glad to hear them right away and out of order as an accommodation to them. On the other hand, if it is not an accommodation, we had better proceed in the normal fashion.

Mr. Kehoe: As a matter of fact, we have only two witnesses and they are mostly here because in entering into the pretrial the Government indicated

they would like to have somebody testify as to the nature of the activity of the trade association and somebody to testify as to how the funds were expended. These two witnesses are for that purpose. I know both of them have set aside the day for the case.

The Court: Going to be here anyway?

Mr. Kehoe: I think so.

The Court: If they are going to be here anyway there is no accommodation involved: [3*]

Mr. Kehoe: We'd like to take them in order.

Before we go any further I would like to, your Honor, introduce Mr. Hargrave Garrison of our office who is associated with me in this case and who is admitted to this Court. Has never appeared here, however.

The Court: It is a pleasure to have you, Mr. Garrison.

Mr. Kehoe: Mr. Taubeneck, is it all right with you if I take up the interrogatories as part of the opening statement?

Mr. Taubeneck: That will be fine.

The Court: All right, go ahead, Mr. Kehoe.

Mr. Kehoe: Thank you, your Honor. Now, we have submitted a trial memorandum which is rather complete, your Honor. If you have had occasion to look it over my opening statement can be somewhat briefer.

The Court: I have looked it over. Now, I must perhaps go back and give it further more close at-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

tention after I have heard the case, but I have run through it so I am generally familiar with what the case is about. In brief it boils down to the question of whether these payments to this association are deductible as a business expense or whether they are not, and that in turn is going to depend on what the character of the association was and what its activities were and so on. Is that right? [4]

Mr. Kehoe: That is right, and whether or not, your Honor, the deductibility is precluded by the regulations which provide that sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda including advertising other than trade advertising and contributions for campaign expenses are not deductible from gross income.

The Court: Yes.

Mr. Kehoe: As a little background for your Honor, the quoted regulation is not applicable specifically to—I should say is not included in the regulations under regulation—under Section 23(a) which provides for the deductibility of expenses that are ordinary and necessary. However, the Supreme Court in the Textile Mills Case held that the Commissioner in applying this regulation to the statute under—involving the deductibility of expenses was entirely, it was entirely within his province to so apply it, and the Supreme Court has held that the quoted regulation, while technically it applies to a charitable contribution, or deduction, also applies to deductibility under Section 23(a).

Now, your Honor, in a preliminary way I might

state that we will have very little evidence on the question of whether this was ordinary and necessary. If your Honor will recall the initiative, Initiative 13 expressly provided that the sale of beer and wine would have to be made through [5] state liquor stores and on the face of it a beer wholesaler selling to beer retailers would be put out of business by the passage of such an initiative. There were some very succinct words used by the Court in the Heininger case, one of the cases cited in the memorandum, 133 Fed. (2d), 567. The Court said:

“Without this expense there would have been no business. Without the business there would have been no income. Without the income there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary.”

Your Honor, I can't cover it any better than that.

The Court: Sounds like the old nursery rhyme, what was it—“For want of the nail the shoe was lost, for want of the shoe the horse was lost”—and so forth.

Mr. Kehoe: Yes. To get into the major aspects of the case as we point out in our memorandum, originally this question of the deductibility of expenditures made in connection with influencing legislation was very broadly applied on the liberal side. Your Honor might keep in mind that there are three distinct premises, one where the influence is of the closed corridor type and strictly one that is not proper in the circumstances and one that has [6] been outlawed by almost all of the decisions. The

next is a little bit of a refinement, your Honor, a program taken to the people as such in a wide publicity program to in turn influence legislators who might be in session to pass legislation of a particular variety.

Now, there is a third category, your Honor, which we think is very important and one which has been given recognition in the cases and in rulings of the Commissioner himself, and that is to the effect that a program taken to the people when the legislation is not in session and when no further action on the part of the legislation is necessary, a program taken to the people in connection with influencing their action on legislation, that is initiated with them and goes through them and becomes automatic with them and does not require legislative action by legislators as such, that any expenditure in connection with such program is entirely proper and as long as it is ordinary and necessary it is completely deductible.

I have in the memorandum decision, or in the memorandum brief, traced the early cases where in a good many instances even though an expenditure was made in connection with direct contact with legislators, where there was nothing improper about it, the courts have held that such expenditure was deductible.

Then we had the Sunset Scavenger case in our [7] own Ninth Circuit which seemed to indicate that a broad publicity program in connection with influencing the legislators operating in connection with certain proposed ordinances, that even though that program was not improper in any way in itself as

long as it was influencing legislators in connection with legislation, that that would be nondeductible.

The Textile Mills case came along shortly after the Sunset Scavenger case and there, your Honor, the case has been, by subsequent Tax Court decisions, has been given a much broader application than it really involved. The Textile Mills case involved an action in connection with a program to influence Congress to allow claims involving certain German interests. The attorney had the claims on a contingent basis and he conducted this program of direct influence on Congressmen in connection with passage of the settlement of War Claims Act of 1928. He was successful and attempted to deduct these expenses and the Court said in its opinion:

"Nor have administrative agencies usurped the legislative function by carving out this special group of expenses and made them nondeductible."

Referring to the fact they were nondeductible under the regulations involving influence of legislation. However, [8] further on in the decision the Court said:

"Contacts to spread such insidious influences through legislative halls have long been condemned."

In other words, the Court was recognizing a certain type of influence as being of the variety that would not support the deductibility of the item. However, the cases following the Textile Mills case, Mary E. Bellingrath decision in 46 B.T.A.—that is the old Tax Court when it was known as Board of Tax Appeals—gave the Textile Mills decision the very broadest application and said in it:

"They proceeded to take legitimate and unobjectionable steps through their association to forestall the passage of this legislation in its proposed form. These steps consisted of gathering facts, figures and arguments to be presented before the proper committees of the legislature, which would also be available to individual members of the association in presenting the question from the standpoint of the bottlers to their respective representatives in the legislature. All these activities were normal and in no way sinister or objectionable. They were not engaged [9] in lobbying for hire and there is no evidence that they were attempting to debauch the public morals of the legislators of Alabama. They were engaged in a proper and legal attempt to prevent injury to their business by persuading the legislature that the proposed legislation was unwise, unfair and unwarranted. We have, in the past, refused to recognize the validity of the regulation, in cases where the expenditures were, apart from regulation, ordinary and necessary business expenses. Whatever may have been our views on this subject before the Supreme Court spoke, we must now accord complete validity to the regulation."

In other words, the Court in that Bellingrath case gave the Textile Mills case a much broader application than the Textile Mills case itself would justify. And that is shown in the Lilly case where the Supreme Court in the Heininger case had occasion to specifically refer to a decision in the Textile Mills case, and as a matter of fact in that case they said

very specifically that in the Textile Mills case some types of lobbying were outlawed or disallowed. They did not say all types, and again keeping [10] in mind the very language of the Supreme Court, the Textile Mills decision is and should be much more narrowly construed than the Tax Court had indicated in the Bellingrath case.

But that is all beside the point, your Honor, because as I say, we think this case comes within a third category and one in which it has been recognized that these expenditures are deductible, one where the program is taken to the people and no legislators are involved at all. That case is pointed up—I mean that position is pointed up by the case of Luther Ely Smith which is cited rather fully in this memorandum of authorities. In that case a member of the Bar had contributed funds to a campaign to put over a constitutional amendment on selection of judges. The program of expenditure was a program taken to the people and in no way involved any action on the part of the legislature as such. Actually nothing was needed in the way of legislative action. In that case the Tax Court said very specifically—if I might find it for your Honor here:

“It should be noted that the institute engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment proposed by the initiative of the people, voted upon at [11] a general election, and becoming self-operative thirty days thereafter without the necessity of any action or

approval by either the Legislature or the Governor."

Now, I know your Honor hasn't got the Tax Court returns and I do have it with me for your Honor's use.

The Court: Good.

Mr. Kehoe: And to go on—and this brings up the question of the interrogatories. It is our position that the Commissioner himself has recognized this third exception and where we factually come within the terms of the Luther Ely Smith case we are entitled to the deduction. In that connection the Commissioner has issued several rulings which are in point. One of those is incorporated in the data and information that we are seeking to put before this Court in the interrogatories. I might say, frankly, your Honor, that in connection with this we have been working quite closely with the office of the United States Brewers Foundation in Washington, D. C., Mr. Clinton D. Hester's office. Mr. Hester secured the rulings that we are attempting to get into evidence in this case. It was in connection with the Jackson Beverage Co. of North Carolina. We have received our copies of the ruling from Mr. Hester's office with the specific approval of the taxpayer. Now, in this ruling, your Honor, the basis of the taxpayer's position is [12] pretty well paraphrased in the protest that was filed in the case. And I just want to refer to it briefly, your Honor, and tell you why I think it is completely admissible in this case.

In the protest the taxpayer argued:

"The laws in North Carolina with respect to the sale of malt beverages provide for a company option and the process of determining whether or not the sale of the malt beverage is legal is dependent on the election by the people. The expenditures made by this company were made at a time when the legislature of North Carolina was not in session and were made for purposes of protecting the business of this corporation and not for the purpose of defeating or promoting legislation. The sum of \$2,682.50 paid by the taxpayer to the North Carolina Beer Distributors Association, Cape Fear Malt Beverage Association and Cumberland County Malt Beverage Association, was for the purpose of protection with the hope of insuring the continued operation of the business."

The protest goes on and states that there had been prior [13] local options where the taxpayer was unsuccessful in his action of opposing them and they were out of business. And the very point that the taxpayer is trying to make in this case was in issue in that ruling, that of the expenditure being entirely proper because the legislature was not in session. The legislation did not need action of the legislators. It was a program taken to the people.

Now, in that connection with that matter, we have copies of the acknowledgment of the local Internal Revenue Agent in Charge of receipt of the protest. The protest also asks that the matter be referred to the ruling section in Washington and we have a subsequent letter from the Internal Revenue Agent

in Charge indicating that it had been so referred to the Bureau in Washington for ruling by the Bureau in Washington. The third letter we have attached is a letter from the Internal Revenue Agent in Charge indicating that the matter had been considered and the taxpayer's position was conceded, this after a referral to the ruling section in Washington.

Now, your Honor, we think it is quite important in this case because we are attempting to bring ourselves within a category that was recognized by the Tax Court in the Luther Ely Smith case to also show you that the Commissioner himself has recognized this particular application of facts that we are contending for in this case, and [14] that would be specifically shown in this Jackson Beverage Company ruling which we are attempting to put in by way of the interrogatories.

Now, generally I think our interrogatories are completely justified under Rule 36, under Rule 32 and Rule 26 if they are relevant. And I might say generally on a ruling of this kind in 20 American Juris Prudence it sets forth a number of cases to the effect that if the statement of an officer employee is authorized and uttered in furtherance of his official duties it is admissible against the municipal or other public body by which he is employed. And in Title 28 of the U. S. Code Annotated, Section 1733, books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

Now, here we say frankly, your Honor, there is no privilege because the taxpayer has given us full permission to use this ruling. We say it is relevant. It shows the Commissioner's position on the very issue in our own case and we say it is completely admissible under the rules of discovery provided by the Code.

The Court: All right. Mr. Taubeneck.

Mr. Taubeneck: If the Court please, it is the Government's position these interrogatories are totally [15] irrelevant to this case.

The Court: You see, the problem presented when it is a question of relevancy is how is the Court, the Judge, trier of fact, going to know whether they are relevant or not until he has seen them? In other words, it is the old business of a snake with his tail in his mouth. There is no beginning or end to it. In order to determine whether the material is relevant or not I have got to see it and know about it, and I can't determine it ordinarily in these instances without seeing what it is. Now, if this material when examined appears to be simply a determination of a specific controversy having no general character, I mean the ruling promulgated is not or does not purport to be general in character and only deals with the particular question of that particular taxpayer in his particular, obviously it is not relevant. On the other hand, if in making that ruling some general ruling of the Commissioner is indicated, then it is possible it may be. I would think that in order to have a clear record here in the presentation of this case this material ought to be

made a part of the record and given such weight or value, if any, as the Court thinks it ought to have. Then both parties will be fully, have a full and complete record in case my ruling is reviewed. That is my view of it.

Mr. Taubeneck: Well, I believe the material that the [16] plaintiffs are trying to get in is presented with their interrogatories and they show on their face that they deal simply with a specific case.

The Court: Is that correct, Mr. Kehoe?

Mr. Kehoe: Your Honor—

The Court: Is the material that you would offer attached to your interrogatories in such a way as it is made fully a matter of record in the case?

Mr. Kehoe: Yes, your Honor.

The Court: Well, in that case it seems to me that it isn't necessary at the moment for me to pass on this but to consider it. It may be that my view of the matter is such that it isn't necessary to consider these interrogatories. In other words, I might favor the plaintiff on the general basic underlying issue without regard to this instance and in that case there is no need of my concerning myself about the interrogatories. Do you agree?

Mr. Taubeneck: I agree that is a possibility, your Honor, but I'd like to point out that if the Government is required to answer the interrogatories it simply requires authentication of correspondence between Revenue Service people in North Carolina and the taxpayer. The only way we can authenticate these for the Court is with some kind

of an order and some kind of a time lag. I have pointed this out to Mr. Kehoe and I think we are in [17] agreement that in that case the record should be kept open so that the Government could have time to see if these records still exist and if so, whether these documents are a part of the record.

The Court: The point as it seems to me, and I now recall going back to look at these interrogatories, when interrogatories are propounded the question of whether the responses and the information to be derived by the interrogatories is to be received in evidence or not, or given any weight or value, as any evidentiary weight or value, is not the question on an objection to that interrogatory. On an objection to an interrogatory the only question presented is, does it appear clearly on the face of it that under no conceivable circumstances can the proposed material sought by the interrogatory be of evidentiary value. In other words, it is like the business on depositions. You can ask questions and the mere fact that they may turn out to be inadmissible in and of itself standing alone is not a basis for objection.

Mr. Taubeneck: I understand that is because they might lead to other evidence that would be admissible.

The Court: Yes.

Mr. Taubeneck: I think we are forced to take these interrogatories as requests for admission though, your Honor. They simply ask the Government to state yes [18] or no, are these documents authentic.

The Court: Yes.

Mr. Taubeneck: The first sixteen questions are of that nature. The last two questions, questions 17 and 18, I don't know what they add. They seem simply to ask whether the contents of the documents are as set out in certain particulars. So that I think it is fair to assume that the whole purpose of the interrogatories is to get these particular documents before the Court and I believe that is what Mr. Kehoe has just finished stating.

In addition I'd like to reply to the argument of Mr. Kehoe.

The Court: Yes; I don't want to cut you off at all.

Mr. Taubeneck: I just want to make one further point because I think this is probably a matter that should be kept open; but the burden of Mr. Kehoe's argument, I think, has to do with possible objection of these on grounds of hearsay. That is not our objection at all. I presume that by having Mr. Hester appear in court and make appropriate statements the fact that these things were mailed to him and were mailed and signed by a Revenue Agent, would take them into the exception to hearsay that Mr. Kehoe mentions, but our objection is on grounds of irrelevancy. I think had the Commissioner himself, to the Court or to Mr. Kehoe [19] made a statement about this case, it would be irrelevant.

The Court: About the Jackson Beverage case.

Mr. Taubeneck: Yes; of the Cammarano case.

Mr. Kehoe: If your Honor please, if I might be heard just one moment on that. Our position is that this matter in the Jackson Beverage case is not just

another ruling involving a particular taxpayer. The evidence presented in the interrogatories if proper, will show that the matter was specifically referred to the Bureau in Washington for a ruling in connection with the Jackson Beverage matter, but the matter involved the very issue we are talking about here and it was not a ruling of the Internal Revenue Agent in Charge at North Carolina. It was a ruling of the Bureau itself which is very much in point in connection with the issue involved in this case.

Mr. Taubeneck: But it was still a specific statement unpublished with respect to a single case. Now, there are perhaps countless thousands of such "rulings."

The Court: I have all that very seriously in mind because, of course, it goes without saying that we can't decide one tax case simply because of its supposed general similarity to another tax case where the ruling is in form and character and doesn't purport to go beyond the particular case. I would be well aware of that because then every tax case—why you could bring in endless other cases, six or [20] eight or ten or twelve or fifteen, more or less similar and require the Government to say what they did in various other cases. If that is all that is presented in this then clearly you don't have to answer the interrogatory. On the other hand, if there is something in the ruling made even though it was not formerly published as a regulation, I wouldn't be inclined to go quite to the extreme that you do, namely that it requires some sort of a formal adoption of regulation or formality of the thing. If the

Commissioner's office have in fact adopted a certain interpretation and have so indicated by some written document, even though it is not in the form of a regulation, I'd be inclined to think we might want it in our record, although I can well understand the hazard of doing that.

Mr. Taubeneck: The difficulty, if I can describe it, revenue service machinery, cumbersome as it may seem to the Court, the difficulty in that approach is that it is a little unrealistic because while you might characterize this correspondence, which is all it is, as in a sense a ruling, all it is is a reference of the question from the field back to Washington where there are dozens and dozens of people sitting considering problems on a little more complicated basis than they can dispose of them in the field, and in effect it is one revenue service person ruling on a single case. [21]

The Court: Well, I am going to have to look at these interrogatories more closely now that I understand fully what the point about them is. Since we have got about two minutes to the lunch hour I will do that at the lunch hour and rule immediately following with respect to the interrogatories. However whatever the ruling about the interrogatories is, we are going to go ahead and try the case and if I should rule that you must answer the interrogatories or part of them, we will give you time to do that or something of the kind. But we are going to take the proof and otherwise fully try the case this afternoon. Is that clear to you?

Mr. Kehoe: Yes, sir; we are ready.

The Court: I presume that is agreeable to both of you anyway, isn't it?

Mr. Taubeneck: Yes. Would your Honor like a short statement of the Government by way of preliminary?

The Court: About one minute to go. Do you want to go ahead, would you prefer? It is all right with me.

Mr. Taubeneck: I just want to make two very small points.

The Court: Perhaps you had better make your statement and then I will go over a few minutes and then I will recess until two. Then that will give me an ample opportunity to review the matter in advance. Go ahead. [22]

Mr. Taubeneck: I'd like to point out that I believe the Government has cited only one more case in its memorandum than we have discussed in the plaintiff's memorandum. We are in substantial agreement, I think, on the cases involved here, but we cited Revere Racing case 137 Fed. Supp. which I believe was not discussed in plaintiff's memorandum. The first statement by the Court indicated, I am afraid, a misapprehension of the case. I don't know whether it is serious or not, but I think it should be pointed out because a lot of evidence will be devoted to pointing up this fact, and that is that we don't have here the case that exists in some of the decided cases of a contribution in the form of regular dues to a regular going association.

The admitted facts and I think the evidence will

show the deduction claimed here is for a payment made apart from dues to a special fund.

The Court: Oh, yes; I over-simplified it in my remarks. No; I had that in mind.

Mr. Taubeneck: Well, the cases do differ in that respect and in another respect, but I don't think it is important. Some of the cases deal with the situation where the deductions claimed for direct expenditures by the taxpayer—I believe the Textile Mills case is of that nature—where the taxpayer by himself hired a publicist [23] and two lawyers to spread his message generally to the public as well as to Congress.

Now, that leads us into what apparently is the—in plaintiff's mind—the crucial distinction in these cases that—

The Court: In the plaintiff's mind?

Mr. Taubeneck: In the plaintiff's mind. Two distinctions. One is between bad lobbying and good lobbying. There just isn't such distinction in the cases made, your Honor. The plaintiff points out the language of the Supreme Court in the Textile Mills cases about the lobbyist spreading insidious influence. I think read in context it is perfectly clear all the Court was talking about was the fact that a private person was trying on its own behalf for private purposes to influence public, whether in the legislature or otherwise is not clear in that case. That is the second distinction that the plaintiffs see in the case that just isn't there. That is the distinction between taking the message to the legislature and taking the message to the people. The Textile Mills case itself doesn't point out in the

facts which I think shows that the Supreme Court didn't think it was important how much of the activities of the three hired people was aimed at the general electorate and how much was aimed at Congressmen, individual, at home in their constituencies, upon Capitol [24] Hill or where. It is just not clear from that case. Similarly in the Sunset Scavenger case in this circuit it is not clear whether the expenditures were entirely for publicity disseminated among the general electorate or simply aims at a city council or what not. However, in the other cases cited by the Government, one of which is in this circuit, the Old Mission Portland Cement case, the Courts point out and underscore for our benefit, I think, the fact that in those situations exactly what we have here took place and that was an attempt through publicity campaign to reach all of the voters because it was they who were going to vote on the thing involved. The Old Mission Portland Cement case considered a referendum, a statewide referendum on increased gasoline levy. So that really you have in the cases just the situation that we have here, a case of an individual or a group taking their message for their own private purposes, whether good or bad, to the public in an attempt to **influence legislation**. I don't think—I think it is clear from the cases that nothing turns on the distinction between legislation by the legislature in a body assembled and legislation by the people whether through a voting on an ordinance or voting on mutual betting as in the Revere Racing Association case or in the state voting on a referendum as

Old Mission Portland Cement case or what not. There just isn't that distinction. The result is [25] that you have consistent right down to last year upholding by the Courts of a disallowance of this type of deduction when claimed, a deduction which might or might not be necessary; might or might not be connected with the taxpayer's business, but in any case is a private expenditure in this area of legislation and for that reason not allowed by the regulations.

The Court: All right, I think I have the difference of opinion between you in mind. We will recess until two o'clock.

(Whereupon, at twelve-five o'clock p.m., a recess was had until two o'clock p.m., at which time all parties being present, the following proceedings were had, to wit:)

(Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7 marked for identification prior to trial.)

The Court: Gentlemen, I have gone over the matter of these interrogatories and it is my opinion that the Government should not be required to answer them. I am not going into the detail of explaining why excepting that I am thoroughly satisfied that the action taken in any individual case is, of course, dependent on the particular facts and circumstances involved in that particular case and that is all that appears to be presented in this material [26] called for by the interrogatories. But more than that, gentlemen, I feel that in view of the

fact that we are dealing here with a regulation, a formal regulation adopted many years ago in full force and effect for many years with the statute being enacted and re-enacted following it, that even the Commissioner wouldn't be authorized to depart from the regulation and if in a given case it be assumed that he had, I don't think it would have any bearing or relevancy on the question of what disposition should be made in another case.

Now I do think this, that in order to give the plaintiff a full opportunity to make a record on this in case an appeal is involved, somehow or other the record ought to be completed on it. I will be glad after the conclusion of the case to consider anything that ought to be done about it, but for now I think that is all that need be said.

Mr. Kehoe: Thank you, your Honor. In that connection may I have an exception and—

The Court: Oh yes, the statute gives you one without asking for it, but you most certainly have made it plain that you take the contrary view and accordingly you automatically have an exception. And incidentally, it never bothers me to have counsel ask for an exception because if it helps to let off steam a little bit by doing so, I never resent that because I often did it myself when I thought [27] the Court was wrong.

Mr. Taubeneck: If the Court please, we'd like to clarify one thing before the plaintiff starts presenting his case.

The Court: All right.

Mr. Taubeneck: According to the pretrial order

as entered by the Court, there still is in the case the factual legal issue of whether plaintiff's payments were ordinary and necessary expenses. In checking over the argument in our trial argument, I think it is a little bit ambiguously stated and it might appear we have conceded that issue in the second paragraph of our argument. We did not mean to concede it and do not want plaintiff to rely on the possible appearance that that is a concession.

The Court: In the question presented paragraph, you mean?

Mr. Taubeneck: No, in the argument, in the second paragraph of our argument.

The Court: Well, if you would like to add something to it to express that thought more fully, it is agreeable to me.

Mr. Taubeneck: I would just like the record to say that we did not mean to indicate there—

The Court: That is right.

Mr. Taubeneck: In other words, the argument was [28] written in terms of what we assumed the evidence might well show.

The Court: All right. Now are you ready then to proceed, Mr. Kehoe?

CHESTER A. ADWEN

being duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Kehoe:

The Clerk: State your full name and spell your last name.

The Witness: Chester A. Adwen, A-d-w-e-n.

Q. Where do you reside?

A. 5300 E. 184th St., Seattle, Washington.

Q. Have you been associated with the Washington Beer Wholesalers Association?

A. I have, sir.

Q. In what capacity, Mr. Adwen?

A. Secretary.

Q. How long were you so employed?

A. About ten years and maybe two or three months.

Q. That would mean that you were employed since about 1944, is that correct?

A. 1945.

Q. 1945? [29] **A.** Yes.

Q. Did you work for any like organization before you were employed by the Washington Beer Wholesalers Association?

A. I was Secretary for the Northwest Produce Association for approximately ten years and also Secretary for the Washington State Retail Grocers Association and the Seattle Retail Grocers Association.

Q. Mr. Adwen, what is the nature of the Washington Beer Wholesalers Association?

(Testimony of Chester A. Adwen.)

A. You mean the work we do?

Q. What are its activities generally?

A. The Washington Beer Wholesalers Association is organized, in 1934, primarily for the protection of our members, protection in this respect. I mean by that to say negotiations between the Liquor Board and labor unions mostly. When I took over at that time I think we had 24 labor contracts throughout the state and anything at all, Mr. Kehoe, general trade association that affected their well-being I think would be an easy way to put it.

Q. What did you say your office was with the Washington Beer Wholesale Association?

A. Secretary.

Q. Were you the Secretary of that organization in 1947 and 1948, Mr. Adwen?

A. I was. [30]

Q. Are you familiar with initiative measure in the State of Washington called Initiative 13?

A. Yes.

Q. What was the Initiative 13?

A. Initiative 13 primarily would have in the opinion of the industry—I think I can safely say industry—would have made it necessary to distribute beer and wine through state liquor stores which would have automatically put the taverns and the grocery stores handling beer and wine out of business. At the same time it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business. I don't say a 100 per cent for this reason. It would still probably be necessary for some of the breweries to have representatives to call

(Testimony of Chester A. Adwen.)

upon the Liquor Board to sell their merchandise and their wares, but at least 90 per cent of them would have had nothing to do so they would have gone completely out of business.

Q. Was Initiative 13 the subject of discussion and consideration by the Association in the year 1948? A. Yes.

Q. Will you explain briefly the nature of such discussions and considerations by the Association in 1948?

A. In 1948, Mr. Kehoe, we became aware that this would put our people out of business. I say "our" again bearing in mind at least 90 per cent, and that it was [31] necessary for the organization along with other organizations affected to protect themselves by raising certain amounts of money to see that we were taken care of by probably some advertising concern. That was all discussed previous in 1947 and that brought about the formation of the Industry Advisory Committee. That is what you wanted to know, sir?

Q. Yes, just generally. Did the Association raise money in connection with Initiative 13?

A. Yes. Wait a minute. Not the Association as such. We made every attempt to divorce from the Association the raising of this money for the purpose of combatting Initiative 13.

Q. Well, how was it done?

A. We explored that at some length over a period of months and consulted with the Department of—this gentlemen represents.

(Testimony of Chester A. Adwen.)

The Court: Internal Revenue?

A. (Continuing): Internal Revenue and Mr. Clark Squire, if I can mention his name. I personally talked to Mr. Squire and Mr. Woodward, Mr. Evans and Mr. Peterson.

The Court: Those are all people connected with the Bureau of Internal Revenue here in Tacoma?

The Witness: Yes, sir, that is right.

The Court: Yes.

The Witness: Mr. Evans and Mr. Peterson were [32] in Seattle, your Honor.

A. (Continuing): We tried to divulge some way or arrive at some plan whereby there would be no connection between the Association as such and the raising and disbursement of this fund. I think it was in September of 1947, about that time, that I talked to Mr. Peterson in Seattle and Mr. Lane, I am certain his name was Mr. Lane, and while they never confirmed anything in writing, they gave me their opinion as to how it should be done. And after several meetings we decided to go along with the ideas that they expressed. I don't believe we deviated one bit from the ideas they expressed and what their contention was in their opinion. I want it definitely understood they in no way spoke for the Department of Internal Revenue. It was their opinion—

Mr. Taubeneck: In that event I would have to object that the testimony of the witness about to be given would be inadmissible.

(Testimony of Chester A. Adwen.)

The Court: Yes, yes, that is right. Just tell us what was done, how you did it.

A. (Continuing): We sent out bulletins. We asked members and non-members alike, we asked them to give us a pledge that they would contribute, I believe it was a half a cent a case and three cents a barrel for all the beer they distributed in the state, and that was turned into a fund that we called the Washington Beer Wholesalers Trust Account. [33] That money was expended for the advertising and promotion of combatting Initiative 13.

Q. Now when was that money raised?

A. We started, if my memory serves me rightly, in October of 1947.

Q. Do you remember when the trust fund itself was set up?

A. Now you are asking me a good question.

Q. It is covered by the pretrial order so I won't go into that.

A. We prepared, I believe Mr. Kehoe, three resolutions that were submitted to the Seattle First National Bank. The last one they accepted. Two they refused. And then they asked us to sign a regular bank authorization. The exact date I am a little bit hazy on, but it seems to me that was set up in the month of December of 1947.

Q. Would any of this money have been raised while the legislature was in session up until March 13th I believe it was, of 1947?

A. None at all.

(Testimony of Chester A. Adwen.)

Q. Approximately how much money was raised in that campaign, Mr. Adwen?

A. We raised \$62,000 as I recall, sixty-two thousand some odd dollars.

Q. Can you tell us in a general way how the money [34] was expended? A. Well—

Q. I might pinpoint that question a little more. I don't expect you to tell me how the Industry Advisory Committee expended the money. I expect you to tell me how you expended the money.

A. I think that calls for two answers, Mr. Kehoe. I said we had approximately \$62,000. At the end of the campaign in 1948 we had approximately \$5,000 left which would mean that I then had to account for about \$8,000, is that right?

Q. Well, depending upon the other \$52,000 how was that expended?

A. \$53,000, Mr. Kehoe, was expended entirely through the Industry Advisory Council; I believe that is correct.

Q. You turned the money over to the Industry Advisory Council? A. That is right.

Q. Now, how was the money that was expended in 1947 and 1948 that was not turned over to the Industry Advisory Council expended? Just generally.

A. There was no money raised for the program in 1947. I mean by that January, February, March, through October. It was a Dutch treat basis. We had approximately 30 members of our organization that devoted their own time and their own money in talk-

(Testimony of Chester A. Adwen.)

ing to influential people, let's say [35] they might have been legislators, I don't know. But we all chipped in including myself. There was no money-raising campaign put on by the Association as such during the first eight, nine, ten months—that would be ten months wouldn't it, ten months of 1947.

Q. I still would like to know how the \$8,000 that apparently wasn't turned over to the Industry Advisory Committee was spent.

A. That is what I thought you wanted, that is why I questioned you about it just a minute ago. In its inception in the months of January, February, perhaps March, maybe as far as in April, we had considerable mailing pieces that were turned over to our organization, Association I should say, and that \$8,000 was made up of salaries to secretaries, mailing, express charges and other items. I have turned over a complete accounting to both the Department of Internal Revenue and yourself on that, Mr. Kehoe.

Mr. Kehoe: I think that is all, Mr. Adwen.

The Court: Anything else?

Cross-Examination

By Mr. Taubeneck:

Q. Mr. Adwen, this Initiative 13 you have discussed was proposed or was something similar to that proposed previous to this 1948 period to the legislature? [36]

A. It was, sir.

Q. Do you recall when that took place?

(Testimony of Chester A. Adwen.)

A. That would be 1947 not 1948.

Q. I see. What form was that in when it was proposed to the legislature?

A. Practically the same form as it appeared as initiative. The legislature refused it during their session from January, February or March.

Q. Did you keep track of the initiative during that time? A. Did I keep track of it?

Q. That is right. A. Yes.

Q. On behalf of the Association?

A. You might call it that.

Q. Would you describe what you did about that initiative during that time?

A. You mean what I did personally?

Q. What you or the Association did.

A. When I left it. That calls for a little answer. When I left the Northwest Produce Association in the ten years I was with them we did considerable lobbying at Olympia. I would venture to say that I knew personally at least 75 per cent of the legislators. Whatever work I did down there was entirely on my own, sir. I received no compensation from [37] the Association, none whatever, and the same would go for the, I believe, 30 some odd men that made up the group that contacted their friends and friends of friends and so on and so forth. None of us received any compensation for it.

Q. Well now, you have described your activities with the legislators. What were they intended to accomplish, what were you trying to do?

A. Well—

(Testimony of Chester A. Adwen.)

The Court: Well in brief, you were trying to prevent the adoption of this act, weren't you?

The Witness: In brief I would say so.

The Court: Yes.

A. (Continuing): But there was a number of other things, of course, that I—

Q. This committee that you described of 30 people, when did that function?

A. That functioned almost entirely through the year 1947.

Q. Both during and after the legislative session?

A. No, it was just continued after the legislative session because the legislature refused to act on it, refused to take any action on it whatever. May I say this, sir, we were not too much concerned about the action of the legislature at any time. [38]

The Court: Just died in committee, never came out on the floor for a vote, is that what happened to it?

The Witness: Yes.

Q. Then you believed from the outset that your principal fight would be after the legislative session?

A. We were fairly sure of that.

Q. These general activities of the Association, of course they continued during 1948, did they not?

A. What general activities?

Q. The negotiations with the various commissions and boards and general activities for the well-being of the Association?

A. Oh, yes, yes.

The Court: You mean the activities other than those relating to this proposed act?

(Testimony of Chester A. Adwen.)

Mr. Taubeneck: That is right.

The Court: Yes.

Q. And the activities relating to this proposed act were handled exclusively through this fund and Industry Advisory Committee?

A. In 1948, sir?

Q. In 1948. A. Yes.

Q. So that the system was established by 1948, by the beginning of 1948? [39]

A. Beginning if you mean, sir—I would say probably after March of 1948.

Q. Now you have stated that a per keg or per half levy was assessed on the members.

A. I can tell you exactly what it was if you want to know.

Q. Yes, I'd like for you to tell.

A. That is some years ago. I have to refresh my own memory.

Q. Please do.

A. "One-half cent per case, three cents for each half keg, six and one-half cents for each keg of beer distributed by me." Now this is the form if you want it, sir. You are perfectly welcome to have it.

Q. That is all right, no. And was it in that way that all the funds were taken up from the membership?

A. Yes. Funds from the membership including non-members, sir, was all on the same basis.

Q. I see.

Mr. Taubeneck: Would you show the witness Exhibit 4, please?

(Testimony of Chester A. Adwen.)

Q. (Continuing): You have been shown Exhibit 4.

Mr. Taubeneck: I think that is plaintiffs' Exhibit 4.

The Clerk: Defendant's exhibits are A, B, C.

Mr. Taubeneck: I am sorry.

The Court: What exhibit is the witness looking at now?

The Witness: I am looking at the authorization for signing and endorsing checks..

Q. That is Exhibit D? A. Exhibit D.

The Court: All right, go ahead.

Q. Now would you identify that? A. Yes.

Q. What is it?

A. It is an authorization that was tendered the bank in setting up the Industry Advisory Council fund.

Q. Now what fund was that in relation to the other activities you have described?

A. This, sir, was the fund that was set up in which the wineries, beer wholesalers and tavern operators set up called the Industry Advisory fund. That was the fund to which Washington Beer Wholesalers contributed at various times whenever it was necessary to keep, get a little more money in the bank.

Q. I see. Now did the money that you contributed to that fund come from the trust fund that you had already established?

A. Entirely, sir. [41]

Q. So that the money came from the member-

(Testimony of Chester A. Adwen.)

ship on this assessment, went into the trust fund and then was transferred from the trust fund into this Industry Advisory Committee fund?

A. That is right, as it was needed.

Mr. Taubeneck: I would like to offer this Government Exhibit No. D in evidence.

The Court: Any objection?

Mr. Kehoe: No objection.

The Court: Exhibit D is admitted in evidence.

(Defendant's Exhibit No. D admitted in evidence.)

DEFENDANT'S EXHIBIT D

Authorization for Signing and Endorsing Checks

Whereas, the Washington Brewers Institute, the Washington State Restaurant Association, the Washington Beer Wholesalers Association, Inc., and the Washington Wine Council, all being non-profit trade associations interested in some phase of the alcoholic beverage industry, have from time to time during the past several years conferred and advised together through their authorized representatives regarding various matters of common interest, and

Whereas, the said associations have decided to contribute to and establish a joint and common fund for the purpose of defraying the cost of a public relations and educational program for the

(Testimony of Chester A. Adwen.)

Exhibit D—(Continued)

common benefit of the membership of the several associations, and

Whereas, the above-named associations have appointed the following persons as their authorized agents for the purpose of controlling said joint and common fund, the name of the association appearing after the authorized agent's name:

Gerald Hile, Washington Wine Council;

Ray Dale, Washington State Restaurant Association; -

C. A. Adwen, Washington Beer Wholesalers Association, Inc.;

W. J. Lindberg, Washington Brewers Institute.

Now, Therefore, we, Gerald Hile, authorized agent for the Washington Wine Council; Ray Dale, authorized agent for the Washington State Restaurant Association; C. A. Adwen, authorized agent for the Washington Beer wholesalers Association, Inc., and W. J. Lindberg, authorized agent for the Washington Brewers Institute, do hereby jointly and severally agree:

1. That the Pacific National Bank of Seattle be and is hereby selected as a depository for the funds of the authorized agents heretofore referred to and that a bank account shall be opened and kept with the said bank for said authorized agents

(Testimony of Chester A. Adwen.)

Exhibit D—(Continued)

under the following designation: "Industry Advisory Committee Fund."

2. That said bank be and is hereby authorized to honor and pay checks or other orders for the payment of money drawn in the name of "Industry Advisory Committee Fund" when signed by H. J. Durand, Secretary, and any one of the following: Gerald Hile, Agent; Ray Dale, Agent, and C. A. Adwen, Agent, and that said bank be and is hereby authorized and directed to honor, pay and charge to the above account of said authorized agents all checks and orders for the payment of money so drawn when so signed without inquiring as to the circumstances of their issue or the disposition of their proceeds, whether such checks be payable to cash or to the order of endorsed or negotiated by any of the above agents signing them, in his individual capacity or not and whether they are deposited to the individual credit of any above agent or agents signing them or of any other person or not, and without regard to any notation or memorandum made upon said checks or orders.

3. That the said bank be and the same hereby is authorized to cash for or pay to or credit to the individual account of any third person, firm, corporation or any of the above agents all checks or orders payable to the above-named fund either as payee or endorsee when the same are made so

(Testimony of Chester A. Adwen.)

Exhibit D—(Continued)

payable in the same manner as provided in paragraph 2 for signing checks or orders.

4. That the undersigned are bound by the rules and regulations governing checking accounts of said bank and by any changes, modifications or additions thereto, which rules and regulations are posted at all times in the lobby of said bank.

5. That said agents are authorized to transact any other business with the said bank incidental to the powers hereinabove granted.

6. That there shall be no obligation on the part of said bank to see to the application of funds in any case whatsoever.

7. That the foregoing authorizations and each of them, shall be continuing ones and shall not be exhausted by their exercise but shall remain in effect until said bank receives written notice signed by one of the agents to the contrary. If any person becomes interested in the joint account represented by the undersigned, the undersigned will notify the bank promptly.

8. That all prior authorizations relating to any of the above matters be and they are hereby revoked.

In Witness Whereof, we have signed this instrument this....day of January, 1948.

..... Agent
Secretary, Washington Beer
Wholesalers Assn., Inc.

(Testimony of Chester A. Adwen.)

Exhibit D—(Continued)

..... Agent
 Secretary, Washington Wine
 Council.

..... Agent
 Executive Vice President, Washington State Res-
 taurant Assn.

..... Agent
 Counsel, Washington
 Brewers Institute.

Admitted in evidence March 19, 1956.

Mr. Kehoe: If I might ask here, your Honor. We have the pretrial which is agreed—it is like a stipulation, agreed facts. Attached to that are the plaintiffs' exhibits and the defendant's exhibits. This is one of the defendant's exhibits attached to the pretrial. Are we going to have to formally put all—

The Court: To avoid any confusion about it I think you had ought to offer the identification numbers, whatever ones you wish, both of you. We will have it in so there will be no question.

Mr. Kehoe: Could we do it all at one time?

The Court: Do it all at one time but let's finish the examination of this witness and get all the exhibits [42] attended to at a given time.

(Testimony of Chester A. Adwen.)

Mr. Taubeneck: I believe that is all the questions.

The Court: That is all, Mr. Adwen, you may step down. Let's get the exhibit matter attended to first. First Mr. Kehoe, what exhibits are you offering?

Mr. Kehoe: Your Honor, we have seven exhibits, the first being the Articles of Incorporation of Pacific Northwest Beverage.

The Court: What is the number of that?

Mr. Kehoe: Number 1.

The Court: Offered. Any objection?

Mr. Taubeneck: None.

The Court: Admitted.

Mr. Kehoe: Then we have resolution and bank authorization of the Washington Beer Wholesalers Association Trust Account.

The Court: What number is that?

Mr. Kehoe: Number 2.

The Court: Any objection?

Mr. Taubeneck: No, your Honor.

The Court: Admitted.

Mr. Kehoe: Initiative Legislature No. 13, number 3.

The Court: Any objection?

Mr. Taubeneck: No. [43]

The Court: Admitted.

Mr. Kehoe: We have Treasury Department letter dated June 15, 1949. That is number 4, your Honor.

The Court: Any objection?

Mr. Taubeneck: I think the date on that makes it irrelevant, your Honor, with respect to the status.

The Court: I will admit it for whatever value, if any, it may have.

Mr. Kehoe: Number 5, your Honor, is the resolution and bank authorization furnished the Seattle First National Bank.

The Court: Any objection?

Mr. Taubeneck: ~~None~~, your Honor.

The Court: 5 is admitted.

Mr. Kehoe: Number 6, your Honor, is the Secretary of State's pamphlet on Initiative 13.

The Court: Any objection?

Mr. Taubeneck: None, your Honor.

The Court: It is admitted.

PLAINTIFFS' EXHIBIT No. 6

State of Washington

A Pamphlet

Containing

Initiative Measure No. 169

Initiative Measure No. 171

Initiative Measure No. 172

Initiative to the Legislature No. 13

Constitutional Amendments

To Be Submitted to the Legal Voters of the State
of Washington for Their Approval or Rejection
at the General Election to Be Held on

Tuesday, November 2, 1948

Plaintiffs' Exhibit No. 6—(Continued)

[Washington State Seal]

Compiled and Issued by Direction of
Earle Coe
Secretary of State

Ballot Titles Prepared by the Attorney General

Smith Troy
Attorney General

[Chapter 30, Laws 1917]

Initiative to the Legislature No. 13

Ballot Title

An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties.

An Act repealing all provisions for licenses for the sale of beer and wine to be consumed on the premises, or at retail, and revoking such licenses in existence on the effective date of the Act; making the sale of wine and beer to be consumed on the premises, or at retail, a felony and providing punishment therefor; declaring an emergency and that the Act take effect immediately.

Plaintiffs' Exhibit No. 6—(Continued)

Be It Enacted by the Legislature of
the State of Washington

Section 1. Declaration of Intention. Experience in the State of Washington has shown that the attempt to handle beer and wine on a different basis than that used in handling of other liquor is not successful, and that the evils consequent thereon are greater than any possible benefits to be derived therefrom. It is therefore declared to be the intention of this measure to eliminate all taverns or beer parlors in the State of Washington, and to stop the consumption of beer and wine on the premises where sold, and to have beer and wine sold at retail only as other liquor is sold under the terms and provisions of the Washington State Liquor Act (Chapter 62 of the Laws of the Extraordinary Session of 1933) as now amended.

Sec. 2. Liberally Construed. This entire Act shall be deemed the exercise of the police power of the State of Washington for the protection of the welfare, health, peace, morals, and safety of the people of the State, and all its provision shall be liberally construed for the accomplishment of that purpose.

Sec. 3. Definition of Terms. In this Act unless the context otherwise requires, the meaning to be given to the various terms used shall be the definitions thereof set forth in the Washington State

Plaintiffs' Exhibit No. 6—(Continued)

Liquor Act (Chapter 62 of the Laws of the Extraordinary Session of 1933) as now amended.

Sec. 4. All provisions of the Washington State Liquor Act (Chapter 62 of the Laws of the Extraordinary Session of 1933) as now amended, relative to the licensing of the sale of beer or wine to be consumed on the premises where sold, or the sale thereof at retail, are hereby repealed, and from and after the effective date of this Act, beer and wine shall be sold at retail only as other liquor is sold under the terms and provisions of the Washington State Liquor Act (Chapter 62 of the Laws of the Extraordinary Session of 1933) as now amended. All licenses now in effect relating to the sale of beer or wine to be consumed on the premises where sold, or at retail, are revoked as of the effective date of this Act.

Sec. 5. Any person, other than the State of Washington, acting through the Washington State Liquor Control Board and its employees, selling beer or wine for consumption on the premises where sold, or at retail, after the effective date of this Act shall be guilty of a felony, and shall be punished by imprisonment in the State penitentiary for not more than five years, or by imprisonment in the County jail for not more than one year.

Sec. 6. All acts or parts of acts in conflict herewith are hereby repealed.

Sec. 7. If any section or provision of this Act shall be adjudged to be invalid, such adjudication

Plaintiffs' Exhibit No. 6—(Continued)

shall not affect the validity of the Act as a whole or any section, provision, or part thereof not adjudged to be invalid.

Sec. 8. This Act is necessary for the preservation of the public peace, health, and safety, the promotion of the public welfare and the support of the State Government and its existing institutions, and shall take effect immediately.

* * *

Argument for Initiative to the
Legislature No. 13.

(1) A Vote for Initiative No. 13 Is a Vote to Close the Taverns and transfer the sale of beer and wine to the State Liquor stores where hard liquor is now sold. This would more effectively control an increasingly harmful situation.

(2) Unquestionably Taverns [Are a Menace. They are the breeding places for immorality, crime and youth delinquency. Read the stories (of tavern-centered tragedy) in your own newspapers. Quarrels—fights—broken homes—unattended children—drunken men, women, juveniles—drunken driving. The taverns of today are far worse than the old time saloons ever were.

(3) A Tavern Is an Economic Liability to Any Community.

a. It reduces the value of adjoining property. No respectable business wants a tavern next door.

Plaintiffs' Exhibit No. 6—(Continued)

b. The average tavern patron is a poor credit risk.

c. Money spent in taverns is largely lost to essential business.

(4) Liquor Interests Term the Tavern the "Poor Man's Club." A "Club" which exploits the weaknesses of its members, making them "poorer," physically, financially, mentally and morally, is indeed a "poor" club for any person.

(5) Employment Conditions Will Be Greatly Improved by the passage of No. 13. Tavern workers temporarily unemployed will be quickly absorbed in more respectable work. Reputable concerns occupying buildings vacated by taverns will increase rather than decrease employment. Buildings vacated when 12 taverns were recently voted out near 63rd and Kimbark in Chicago, were immediately occupied by other concerns.

(6) Tavern Operators Claim That No. 13 Would Cause a Loss of Tax Income to the State. Authoritative sources reveal that it is costing our State, county and city governments more than twice as much to control and regulate the tavern and care for its victims, as the revenue received through beer and wine taxation.

(7) Some Will Say That the Passage of No. 13 Would Increase Bootlegging. This is not true! It is estimated that 18,000,000 gallons of bootleg liquor were made in the United States last year. The

Plaintiffs' Exhibit No. 6—(Continued)

Federal Government has caught from 15,000 to 20,000 bootleggers a year during the past sixteen years, according to Ethel Hubler in the National Voice. Initiative No. 13, Which Would Make Beer and Wine Available in State Liquor Stores, would tend to discourage bootlegging.

A Day of Decision Is at Hand. The Taverns Have Sinned Away Their Day of Grace. No Longer Will the Voters of the State of Washington Tolerate These Establishments Which Disgrace Men, Women and Children, and Undermine and Sabotage the Welfare of the People of This State.

Close the Taverns! Strengthen the Steele Act!
Protect Our Homes and Youth!

Cut the Cost of Law Enforcement and Crime!

Vote For Initiative No. 13.

**WASHINGTON TEMPER-
ANCE ASSOCIATION,**

M. A. MARCY,

President;

H. L. PATCHETT,

Secretary.

**Argument Against Initiative to the
Legislature No. 13****The Prohibitionists' Measure**

Initiative 13 is a measure sponsored by the Prohibitionists. To get a clearer idea of the Real purpose, read the "Ballot Title" on a preceding page.

Plaintiffs' Exhibit No. 6—(Continued)

It starts out:

"An Act Prohibiting the retail sale of beer and wine. * * *" and that word "Prohibiting" is the key to the Prohibitionists' scheme. They are trying to trick you into Prohibition, step by step.

Drastic First Step Toward Prohibition

Initiative 13 is the first step. The Prohibitionists would Forbid the sale of beer and wine—not only in taverns, but, Also in Restaurants and Grocery Stores. Not a Single Glass of Beer Could Legally Be Sold in the State of Washington!

Isn't That a Drastic Step Toward Full Prohibition?

Prohibition's Evils Again

What would the results be? The same as they were during national Prohibition. With sales of beer and wine forbidden everywhere except in state stores, speakeasies would spring up—followed by the bootlegger, the racketeer, the gangster, and all the vile crew who thrived on the illegal trades of Prohibition days.

And why?—only because the Prohibitionists believe it should be illegal to buy a friendly glass of beer!

The Alternative to the Legal, Licensed, Regulated Tavern Is the Illegal Dive—the filthy back-alley speakeasy and the isolated country roadhouse.

Plaintiffs' Exhibit No. 6—(Continued)

There's more to the Prohibitionists' scheme, too. If they put over Initiative 13, the resulting crime, gangsterism and corruption, would, they hope, discredit the entire present system in the State of Washington, and make their final step, complete Prohibition, so much easier.

Opposed by Sheriffs, Veterans
Labor

This is what the sheriffs of the state say:

"Initiative 13 * * * would result in the springing up of speakeasies, bootleggers, * * * would generally foster lawlessness and result in increased sales to minors through illegal sources, just as similar restrictive measures did during Prohibition."

—Washington State Sheriffs Association; Resolution Passed at Their State Convention at Everett, June 4, 1948.

This is what the Veterans of Foreign Wars say:

"Many thousands of jobs for veterans are directly and indirectly involved * * * If the present, legal sale of beer and wine by licensed retail outlets is forbidden, the inevitable result will be speakeasies, bootleggers; * * * the Veterans of Foreign Wars condemn this effort to cause a return to Prohibition conditions, and to curtail personal liberties."

—Veterans of Foreign Wars; Resolution Passed at Their Annual State Encampment at Tacoma, June 26, 1948.

Plaintiffs' Exhibit No. 6—(Continued)

This is what the Washington Federation of Labor says:

"Initiative 13" would do worse than cause unemployment. It would force many members of the A. F. of L. to work in speakeasies, bootleg joints and other crooked businesses. It would mean the loss of their membership cards because of union rules denying membership to persons engaged in illegal sale of liquors."

—E. M. Weston, President, Washington State Federation of Labor, in an Address at Spokane, June 11, 1948.

Serious Effect on the State

These are the most serious effects of Initiative 13—but there are also others. The beer and wine industry provides jobs directly for 14,000 persons in the state—jobs with an annual payroll of \$35,000,000. It pays taxes of nearly 22 million dollars a year. It is a Washington business, buying more than \$52,000,000 a year in Washington products.

And why are the Prohibitionists bent on passing Initiative 13?—Because They in Their Intolerance Would Deny Every Citizen of Our State the Privilege of a Friendly Glass of Beer!

Don't Be Tricked Into Prohibition!

Vote Against Initiative 13!

Filed in the office of the Secretary of State
6/25/48.

Admitted in evidence March 19, 1956.

Mr. Kehoe: Number 7, your Honor, are reproductions. It is one exhibit. It covers reproductions of some of the advertisements on initiative 13.

The Court: Any objection?

Mr. Taubeneck: None so long as there will be some description about the part they play in the campaign. [44]

The Court: All right, Exhibit 7 is admitted.

(Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7 admitted in evidence.)

Mr. Kehoe: Those are Plaintiffs' Exhibits.

The Court: Do you want to put yours in at the same time and have it all done at once?

Mr. Taubeneck: All right. We just have two exhibits that we want to put in.

The Court: What are the numbers or the letters?

Mr. Taubeneck: I am going to have to check on that. The second one, I believe it would be Exhibit B, and Exhibit E.

The Court: You are now offering B and E. Are there any objections to these items?

Mr. Kehoe: No objection, your Honor.

The Court: Defendant's Exhibits B and E are admitted in evidence.

(Defendant's Exhibits B & E admitted in evidence.)

DEFENDANT'S EXHIBIT E

Statement of Cash Receipts and Disbursements Industry Advisory Committee

For the period February 1, 1948, to April 30, 1949, inclusive

Receipts

Washington Brewers Institute (Note A).....	\$ 89,450.00	
Licensees Against Initiative 13.....	58,030.00	
Washington Beer Wholesalers Association.....	53,500.00	
Washington Wine Council, Inc.	25,000.00	
Retail Grocers Against Initiative 13.....	3,213.10	
Other Contributors	2,064.00	\$231,257.10

Disbursements

Administrative Expense

Salaries	\$ 17,520.83
Traveling Expense	10,852.84
Public Opinion Polls	5,733.35
Telephone and Telegraph	1,589.68
Rent	1,228.04
Postage and Express	1,135.64
Meeting Expense	1,009.28
Furniture and Fixtures Expense.....	523.39
Stationery and Printing	463.32
Social Security Taxes	426.27
Office Supplies and Expense	374.51
Dues and Subscriptions	250.80

Miscellaneous	349.80	\$ 41,457.75	
Public Education and Information Expense			
Advertising:			
Newspaper	\$ 69,440.77		
Radio	24,898.80		
Billboard	8,983.48		
Miscellaneous Publications	2,061.82		
Direct Mail	1,586.85		
Buses and Street Cars	960.19		
Miscellaneous	161.85		
	\$108,093.76		
Printing and Typography	\$ 37,039.65		
Engravings and Electrotypes	5,686.10		
Artwork	1,656.70		
Layouts	364.75		
Photostats	273.58		
Miscellaneous Printing Expense	472.05		
Public Relations Service Expense	17,850.00		
Agency Commissions	7,614.30		
Speakers and Special Service Expense	6,530.77		
Convention Expense	1,965.08		
Radio Production Expense	1,267.07		
News Release Expense	511.94		
Retail Grocers Expense	473.60	\$189,799.35	\$231,257.10

Defendant's Exhibit E--(Continued):

(Note A)

Washington Brewers Institute: Amount as shown above..... \$ 89,450.00

Additional

Opinion Research Corporation \$ 12,000.00

Rental Value of Billboards 12,000.00

Bozell & Jacobs Fee—1947 5,000.00

Central Survey Poll 250.00 29,250.00

Total \$118,700.00

Defendant's Exhibit E—(Continued)

Schedule of Salaries and Traveling Expense
Industry Advisory Committee

For the period February 1, 1948, to April 30, 1949

Executive Director	Salaries	Traveling Expense
Harrie O. Bohlke.....	\$10,562.50	\$ 3,722.60
Fieldmen (Note B)		
Percy Willoughby	\$1,455.00	\$1,507.45
Guy B. Hill.....	1,306.67	614.16
Norman A. Carlson.....	1,225.00	1,423.88
Victor B. Ross.....	933.33	554.15
Frank L. Marshall.....	571.67	46.85
H. N. Barney Jackson....	455.00	261.42
John E. Mitchell.....	373.33	377.81
Wm. E. Richards.....	225.00	100.00
	6,545.00	4,885.72
Stenographer		
Emily R. Carlson.....	413.33	
Miscellaneous		
H. J. Durand.....		\$ 929.25
Keith McCormie		400.00
Wm. C. Speidel, Jr.....		379.40
Various Speakers		243.42
Bozell & Jacobs, Inc....		164.45
Wm J. Lindberg.....		122.00
		2,244.52
Total	\$17,520.83	\$10,852.84

(Note B) All fieldmen were paid upon the basis of \$350.00 per month except Wm. E. Richards, and the amounts indicated above reflect the length of their service.

vs. United States of America

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Defendant's Exhibit E—(Continued):

Schedule of Public Relations Service Expense
Industry Advisory Committee

For the period February 1, 1948, to April 30, 1949, inclusive

Name	Amount
Bozell & Jacobs, Inc. (Note C).....	\$13,200.00
Wm C. Speidel, Jr.	4,000.00
Jack Gordon	500.00
Miscellaneous	150.00
Total	<u>\$17,850.00</u>

(Note C) In addition to the total fee indicated above, Bozell & Jacobs, Inc., received Agency Commissions aggregating \$7,614.30. They also received 15% commission on newspaper advertising for an estimated amount of \$10,416.00.

Schedule of Convention Expense

National Alcoholic Beverage Control Association.....	\$ 544.18
Washington State Retail Grocers Association.....	400.77
American Legion	324.81
Washington Newspaper Publishers Association.....	280.25
Labor and Industry Exposition.....	200.00
Veterans of Foreign Wars.....	124.44
Disabled American Veterans.....	90.63
Total	<u>\$1,965.08</u>

The above schedule does not represent the actual cost of participating in these Conventions for the reason that additional expense for nominal amounts are reflected in the travel expense of Harrie O. Bohlke and H. J. Durand.

Admitted in evidence March 19, 1956.

The Court (Continuing): All right. Would you go forward now, Mr. Kehoe?

Mr. Kehoe: There are two other exhibits defendant is going to offer. Are you holding those back for the time being? [45]

Mr. Taubeneck: We don't intend to offer them.

Mr. Kehoe: I am a little confused, your Honor.

The Court: If you find that you want to offer them why you may do that, but we will go ahead with your witness if you have got another witness.

Mr. Kehoe: May I have Mr. Adwen back just briefly then, your Honor?

The Court: All right, come back, Mr. Adwen, please, I am sorry.

Mr. Kehoe: Do I understand you are not going to put this in evidence?

Mr. Taubeneck: No.

CHESTER A. ADWEN

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Redirect Examination

By Mr. Kehoe:

Q. Mr. Adwen, I will hand you for identification an instrument that is entitled "Copy of Bulletin dated November 20, 1947, Washington Beer Wholesalers Association, Inc." Would you tell me what that is, please?

A. Well, Mr. Kehoe, it is evidently a copy of a

(Testimony of Chester A. Adwen.)

bulletin I put out. I can read here. It sounds like my terminology: I wouldn't dispute it. I think it is. But it is [46] not on—of course we never use this size paper so I presume this is a copy.

Q. Would you check it through briefly and see if it—does it also cover a supplement to the bulletin?

Mr. Taubeneck: I think we are in agreement in the pretrial order on the authenticity of this.

Mr. Kehoe: That is what I am getting at, your Honor. I would like to put it in evidence. It was my understanding the Government was putting it in evidence.

The Court: Now what exhibit numbers are there? Are there some others in that same category or just this one?

Mr. Kehoe: Just this one.

The Court: What was the identification number given to it?

Mr. Kehoe: It was in the pretrial as—

The Court: That is what I am trying to find out, what identification?

Mr. Kehoe: As Defendant's Exhibit 3.

Mr. Taubeneck: C it would be.

The Court: It wouldn't be a 3 if it was defendant's.

The Clerk: They so numbered them in the pretrial order. I renumbered the defendant's and it is Defendant's Exhibit No. C.

The Court: Is that the same document the witness [47] has been referring to?

(Testimony of Chester A. Adwen.)

Mr. Kehoe: Yes.

The Court: You are offering C now, are you?

Mr. Kehoe: I am offering C as my exhibit, your Honor.

The Court: I understand that. Any objection?

Mr. Taubeneck: Yes, there is, your Honor.

The Court: What basis?

Mr. Taubeneck: There is hearsay in this document along the same lines that the witness attempted to testify to before about conversations with the Revenue Service. If it were offered for some limited purpose we might—

The Court: I will receive C, Defendant's Exhibit C now offered as a Plaintiffs' Exhibit. It is admitted in evidence for whatever weight and value it may have.

(Defendant's Exhibit C, offered as Plaintiffs' Exhibit, admitted in evidence.)

Mr. Kehoe: That is all, Mr. Adwen.

The Court: That is all, Mr. Adwen.

(Witness excused.) [48]

HERBERT J. DURAND

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Kehoe:

The Clerk: State your full name and spell your last name.

The Witness: Herbert J. Durand, D-u-r-a-n-d.

Q. Where do you reside, Mr. Durand?

A. 1902-Bigelow Avenue North, in Seattle.

Q. Where do you work?

A. In the Olympic Hotel in my office.

Q. Who is your employer?

A. The Washington Brewers Institute.

Q. And what is your position with the Washington Brewers Institute?

A. Secretary Manager.

Q. How long have you been employed by the Washington Brewers Institute?

A. Since January 1, 1935.

Q. How long have you been employed as Secretary Manager?

A. Since January 1, 1935.

Q. Just tell me generally what is the Washington Brewers Institute, what does it do? [49]

A. Well, it is a trade association in the usual respect.

Q. And by that you mean what?

A. Performing the customary trade association activities. If you wish me to elaborate on that—

(Testimony of Herbert J. Durand.)

Q. I would like some elaboration.

A. Well, the function of Washington Brewers Institute at least is to maintain contact with the National Associations and act as liaison with the federal control authorities and the Washington State Liquor Control Board to assemble, compile and disseminate information that is pertinent to the industry.

Q. Mr. Durand, are you familiar with an initiative measure in the State of Washington, an initiative entitled Initiative 13? A. Yes, sir.

Q. Was Initiative 13 the subject of discussions and consideration by your organization in 1947 and 1948? A. Yes, sir.

Q. What generally was the nature of such discussions and considerations?

A. Well, the apprehension that you can visualize would occur for a matter of such great importance to our industry.

Q. Did they determine any policy in connection with [50] Initiative 13?

A. Not until it became a definite issue.

Q. When was that?

A. After the legislature had failed to take action.

Q. Did the Washington Brewers Institute raise any money in connection with Initiative 13?

A. Yes, sir.

Q. When was that?

A. Well, not that I recall exactly. I would say, however, either one or both of November and December, 1947.

(Testimony of Herbert J. Durand.)

Q. How much was raised approximately?

A. We made a special assessment of \$60,000.

Q. And how was it expended? By that I don't mean how the industry—

A. By contributions to the Industry Advisory Committee.

Q. And—

A. May I make one observation?

Q. Go ahead.

A. It has been mentioned as Industry Advisory Council on numerous occasions here; but the correct name was Industry Advisory Committee.

Q. When was the Industry Advisory Committee set up approximately?

A. Well, somewhat formally about the first of January, 1948. And please don't misunderstand the term [51] "formally." It was an informal organization. It was not incorporated.

Q. What was your position on it?

A. I was a Secretary.

Mr. Kehoe: May I have Defendant's Exhibit E?

Q. Mr. Durand, I will show you Defendant's Exhibit E, a statement of cash receipts and disbursements by the Industry Advisory Committee. Would you kindly identify that, please. Is that the accounting for the expenditure of the fund over to the Industry Advisory Committee?

A. That is true.

Q. And were the brewers, Washington Brewers Institute funds, turned over to that committee and are those included in that report?

A. That is right.

(Testimony of Herbert J. Durand.)

Mr. Kehoe: I believe that is all, your Honor.

The Court: Anything further from Mr. Durand?

Mr. Taubeneck: Yes, your Honor.

The Court: All right, go ahead.

Cross-Examination

By Mr. Taubeneck:

Q. Are you aware of the use that was made by the Industry Advisory Committee of these funds?

A. Yes, sir. [52]

Mr. Taubeneck: Would you show the witness Defendant's Exhibit B.

Q. Was this one of the publications put out by you of those funds? A. Yes, sir.

Q. Is that typical of the publications you put out?

Mr. Kehoe: Your Honor, I object to that. That is calling for a rather—for a conclusion on the part of the witness which I don't think he is qualified to make.

The Court: Well if so, the witness can tell us that.

A. What was your question?

The Court: The question is, is this Exhibit B typical of the type of material that was put out?

A. (Continuing): Well, I'd rather not go so far as to say typical. I don't know what you mean exactly by the word "typical."

(Testimony of Herbert J. Durand.)

Q. Well, what other types of advertising were put out?

A. Well, the principal activity was newspaper advertising and radio broadcasting. There were large quantities of literature distributed through various channels.

Q. Those were the three forms of advertising used?

A. I would say almost entirely. There might have been a few exceptions. [53]

Q. Was anything else done beside advertising?

A. This was a special activity.

The Court: You mean Exhibit B?

The Witness: Well, as evidenced by the signature on the back.

The Court: I mean you are referring to Exhibit B, are you, Mr. Durand?

The Witness: Yes, sir; yes, sir.

The Court: All right.

Q. Now are the reproductions inside there the sort of thing that was done in your newspaper advertising?

A. No, they were not. These are reproductions of news articles that appeared in other sections of the United States, but they were not used in advertising, I don't believe.

Q. What besides advertising did the Industry Advisory Committee handle?

A. May I have that Exhibit B to refresh my memory?

The Court: Yes, of course.

(Testimony of Herbert J. Durand.)

A. (Continuing): This financial statement is broken down in considerable detail and shows the type of advertising. Billboard I neglected to mention, miscellaneous publications and some direct mail, streetcar cards and all that sort of thing.

Q. You mean beginning print and topography?

A. That is right. [54]

Q. And so on. That was all in it, all to the advertising?

A. That is right.

Q. Did any of this advertising to your knowledge urge people to drink, drink anything in particular?

A. No, sir.

Q. Did it urge them to patronize anybody in particular?

A. No, sir, I wouldn't believe so.

Mr. Taubeneck: I believe that is all.

The Court: All the material was directed toward discouraging, if I may use that term, adoption of an act similar to that which the legislature had declined to act on, is that right?

The Witness: If your Honor, would you permit me to state it in my own way?

The Court: I'd be glad to have you.

The Witness: It was directed as a means of educating the public as to the nature of the initiative measure which they would otherwise not know.

The Court: All with the view of procuring its non-adoption?

The Witness: That is right.

The Court: I believe that is all, Mr. Durand, thank you.

Mr. Kehoe: The plaintiff rests. [55]

(Witness excused.)

The Court: The Government?

Mr. Taubeneck: The Government rests, your Honor.

The Court: All right. Are you ready to present your argument?

Mr. Kehoe: Yes, I am, your Honor.

The Court: Go ahead.

Mr. Kehoe: As I indicated in the opening statement we are dealing here with a regulation and not a statute. However the regulation has been in effect for a number of years and Congress has not seen fit to eliminate it so it has been given a lot of force and effect in the decisions. It is not a regulation under the particular statute that we are involved with, that of ordinary and necessary business expense but again court decision has indicated that the Commissioner's position that the regulation applicable under that section has been upheld. That was the Textile Mills decision in the Supreme Court, your Honor.

Now we take the position that under the factual situation involved in this case there has been a recognition that expenditures of this type are entirely deductible. The only case directly in point is that of Luther Ely Smith in the Tax Court, your Honor, where the Court held that as long as there was no legislation before legislators and the program was taken directly to the people in connection with legislation [56] or a matter that would become effective without any action on the part of

legislators that the expenditure would be entirely deductible.

Now getting into the cases that did involve legislation before legislators as I have indicated in our memorandum brief, originally the Courts were quite liberal in allowing the expenditure. In the early cases unless it were a matter that was against public policy in the form of illicit influence on legislators as such, the expenditure was allowed as a deduction as long as it was ordinary and necessary. Then we had the Ninth Circuit case in *Sunset Scavenger* where the Court held that even though it involved a program taken to the people, as long as it involved an indirect influence on the legislators who had to act in connection with the matter, with the measure, that the regulation was broad enough to include the deductibility of the item. Later on we had the *Textile Mills* security decision in the Supreme Court and following that the decisions construed the *Textile Mills* case as being broad authority for the proposition that not only would you have to have illicit transactions involved to preclude the deductibility but activity that was perfectly lawful and yet was an influence on legislators as such, that would be precluded.

Now as we go on to point out, your Honor, in the memorandum brief, I think those cases following the *Textile* [57] *Mills* decision gave it too broad an interpretation and that is borne out by the decision of the Supreme Court itself in the later case involving the *Lilly Co.*, which involved a ques-

tion of the deductibility of certain kick-backs which the opticians had been making in connection with the sale of glasses. The Supreme Court of the United States said that in connection with that Lilly decision that they had granted certiorari to review their seemingly inconsistent positions in a case called the Heininger case which involved a mail fraud contest, question of deductibility of expenses in connection with contesting a mail fraud matter by a practicing dentist, and the Textile Mills decision which is the one we are talking about here. They reviewed the Textile Mills decision and they reviewed the Heininger case and they held in connection with the kick-backs that they were deductible in the Lilly case because they didn't violate any matter of public policy.

They pointed out specifically in several states, I believe North Carolina was one of them, and in a footnote they point out that in the State of Washington there were specific statutes that outlawed the kick-back practices and they indicated that if the expense was involved in those particular states where there was a statutory prohibition on that type of transaction, then the items would not be deductible for federal income tax purposes. But they [58] held that, in this case while it may not have been the best thing from a public policy standpoint, there was no, nothing generally by way of statute that precluded them and they allowed them as a deduction. And as a matter of fact it is important in this case, your Honor, because not only are these activities that we are concerned with

here not precluded by state statute, but they are actually fostered by state statute. Attached to our brief, your Honor, are provisions of Washington law providing for, in the case of an initiative of this kind, providing for the arguments for and against to be publicized by the Secretary of State's office in a pamphlet, and we have a copy of the pamphlet in evidence here pointing out the benefits or giving publicity on the arguments on either side of these initiative measures so the public can make an adequate selection. That was what was followed here. You will find in the pamphlet one of the arguments of the Industry Advisory Committee reproduced and that was reproduced at the expense of the Industry Advisory Committee, but it was circulated by the Secretary of State at the cost to the state. In other words, the state financed the distribution of that.

But to get back to Textile Mills case and the discussion of the Textile Mills case in the Lilly case which is the later case discussing the Heininger case and the Textile Mills case. In that case the Supreme Court referred to the* [59] Textile Mills case and the Heininger case in this language.

They said:

"In the Textile Mills Corporation vs. the Commissioner, 314 U.S., 326, this Court accepted an interpretation of that section by a Treasury regulation which disallowed the deduction of certain expenditures——"

Now notice the word "certain."

“—of certain expenditures for lobbying purposes. In doing so the Court referred to the fact that some types of lobbying expenditures have long been condemned by it and that the interpretive regulation had itself been in effect many years with congressional acquiescence. The instant case does not come within that precedent.”

And again keep in mind, your Honor, the language I quoted before from the Textile Mills decision to the effect that the Court there specifically said contacts to spread such insidious influence through legislative halls have long been condemned. In other words, they were dealing there with lobbying in connection with a bill on the war claims of German interests. The attorney had it on a contingent fee basis. He hired several lawyers to argue with congressmen. [60] The contact with the legislative body, with Congress, was direct, and that was not the type of expenditure that would qualify under either the indirect influence on legislators through a publicity program taken to the people or a program taken to the people where the legislation would have been effective without any action on the part of the legislators. And I believe, your Honor, that if this question came up today under these later decisions—another decision of the Supreme Court is that of Rumely where the Court, the lower Court used this expression: The question involved expenditures in connection with certain pamphlets on national affairs which Mr. Rumely distributed to the public to influence the public opinion in connection with congressional

action and the question was whether or not that was indirect lobbying, and in the lower court the Court pointed out that Congress could not control such activities and that rather than being bad so-called indirect lobbying, influencing or encouraging, promoting or retarding legislation through pressure on public opinion, pointed out that that was good. The Supreme Court affirmed the lower Court in that position in *U. S. v. Rumely*, 345 U.S., 41.

As I say, I think the decisions have become a little more realistic and there would be a recognition that in the case of influence brought through public pressure, through a program taken to the public indirectly through [61] the legislators, I think that that would not be condemned, your Honor, under the present decisions. In any event I think the one exception where there is no action before any legislature and where there is no direct or indirect influence on the legislators themselves, I think that is clearly recognized. It is recognized especially in this *Luther Ely Smith* case and the *Robert Gary Co.* case where it was specifically pointed out petitioners have cited several cases as authority for allowing this deduction as a business expense which we think inapplicable. And they go on and say in *Luther Ely Smith*, 3 Tax Court 6396 it held no legislation was involved inasmuch as an amendment to the constitution for the State of Missouri was voted by the people and became self-operative without approval of the legislature. In the *Luther Ely Smith* case itself they drew the definite distinction that the program was a program

taken to the people. It in no way involved an action that was pending before legislators needing further action by the legislators as such. It was a program of publicity taken to the people in connection with a measure that would become operative by the action of the people. As in the Rumely case there is nothing against public policy in that, and bear in mind, your Honor, there is a substantial amount of money that has been spent here. On the face of it it is clear that it was a business expense. Non-members of the [62] Association were contributing on a percentage basis as well as members. It is clear they did, from their own standpoint they considered this a business expense. If it is disallowed to them as a deduction it means not only that they paid a hundred per cent for the expenses involved but they are paying, they will have to pay an additional fifty-two per cent because of it being disallowed as a tax deduction. And again bear in mind, your Honor, the statement from the Heininger case. Without this expense there would have been no business. Without the business there would have been no income. Without the income there would have been no tax. To say that this expense is not ordinary and necessary is to say that which gives life is not ordinary and necessary.

We submit, your Honor, that the regulation is designed to preclude an expense that is something that is to be discouraged. Where you have the necessity of the expense and you don't in any way come under the terms of the prohibition contained in the regulation, certainly as a matter of equity it

should be allowed as a deduction and we believe under the decisions there is one hundred per cent support for the allowance of the deduction. The Luther Ely Smith case is the only one in point. There is the possibility of the McClintock-Trunkey decision having application here, your Honor, because it involved a member of the Washington Beer Wholesalers Association. It involved dues paid to the [63] Washington Beer Wholesalers Association during the year 1948. We have the record of the case, your Honor, and we have made reference to it in the memorandum of authorities.

The Court just didn't have the evidence before it. They had—the evidence didn't even show whether the matter was before the legislature; as a matter of fact the bylaws, or rather the Articles of Incorporation of the Washington Beer Wholesalers Association were not put in evidence. The transcript of the record went to the Circuit Court of Appeals, your Honor, on another point and was reversed. The point on the question of the deductibility of the dues paid to the Washington Beer Wholesalers Association during that year was not taken up. The record on the issue involved in this case is about three and one-half pages long, your Honor, and it was our intent and we would like to put the entire record into the evidence in this case for your Honor to see the inadequacy of the record on the points involved here, and with Government counsel's permission I'd like to offer it now as a matter of fact.

Mr. Taubeneck: It looks official enough but I don't know that it is necessary. We are not relying on this case.

The Court: Which case are you referring to?

Mr. Kehoe: McClintock-Trunkey decision, your Honor. [64]

The Court: Well, I think it would be extraordinary to make a statement in the record in another case in the Circuit Court an exhibit in this case. You can argue from it if you want, but I don't think it is appropriate to make it an exhibit.

Mr. Kehoe: Your Honor, I submit that we have examined the record in the other case. We have examined the brief of the Government in the other case and the brief of the taxpayer and the Articles of Incorporation of the organization were not put in. The reference to whether or not this was a matter before the legislature was inadequate. The matter was taken on the deposition of the president of the McClintock-Trunkey Co., Mr. Franklin F. Trunkey, and he discussed the activity of the Washington Beer Wholesalers Association in connection with the Initiative 13 matter and he clearly indicated he wasn't sure whether or not it was before the legislature at the time, and as a matter of fact, indicated he wasn't thoroughly familiar with the normal activities of the Washington Beer Wholesalers Association. We feel that the McClintock-Trunkey decision while it is a decision in the Tax Court, is certainly distinguishable from the fact in this case when all of the facts are known.

(Whereupon, the Court gave his oral opinion, a transcript of which was previously furnished.) [65]

Certificate

I, Adele U. Douds, official court reporter for the within-entitled court, hereby certify that the foregoing is a full, true and correct transcript of matters therein set forth.

/s/ ADELE U. DOUDS.

[Endorsed]: Filed May 23, 1956.

DOCKET ENTRIES

1955

Mar. 15—Filed Complaint.

Mar. 15—Issued Summons and 4 cop. S&C.

Mar. 23—Filed Marshal's Ret. on Sum. (on U.S. Atty. and by reg. mail on Atty. Gen.)

May 20—Filed Answer.

Oct. 21—Passed for later assign.

Nov. 28—Set for trial Mar. 12th—counsel notified.

1956

Feb. 21—Filed Interrog. of Pltf. propounded to deft.

Feb. 28—Filed Objection of Deft. to Pltf's. Interrog.—Affid. Mail.

Mar. 6—Filed Pltfs' Trial Memo—Copy to Law Clerk.

Mar. 6—Hear. re Obj., 3/12/56—9:30 a.m.

Mar. 19—Filed Deft's. Trial Memo.—Memo. in sup. Obj. to Interrog.

1956

- Mar. 19—Filed & Ent. Pretrial Order.
- Mar. 19—Enter record of trial; Court; Judge Boldt, presiding Court orally finds for deft.
- Mar. 28—Filed Reporter's Transcript of Court's oral Decision.
- May 23—Filed Reporter's Transcript of Proceedings of 3/19/56.
- June 13—Lodged Govt's. proposed F & C—Lodged Govt's. proposed Judgm.
- June 13—Lodged Pltfs'. proposed Findings of Fact and Conclusions of Law.
- June 13—Filed Pltfs'. Obj. to Def't's. proposed F & C.
- July 10—Counsel notified Present. F & C & Judgm. at Sea. 7/16/56—10 a.m.
- July 10—Filed Notice, U.S., of present. F & C & Judgm.—Aff. Mail.
- July 16—Present. F & C & Judgm. passed to later, Seattle.
- July 24—Ent. record hear. Obj. to proposed F & C and Judgm.
- July 24—F & C signed by Judge Boldt but not to be entered until p. 3-3a retyped and substituted; judgm. not be entered until F & C entered.
- July 30—Filed Pltf's. Offer of Proof.
- July 30—Filed & Ent. Findings of Fact and Conclusions of Law.
- July 30—Filed & Ent. Judgment; Pltfs'. cause dismissed; def't. to recover costs.
- Aug. 3—Filed Cost Bill, U.S. (\$20.00)—Affid. of Mail.

1956

Sept. 6—Filed Transcript of Proceedings (of 3/19/56).

Sept. 6—Filed Transcript of Court's Oral Decision.

Sept. 6—Filed Notice, Pltfs., of Appeal—Cop. del'd to U. S. Atty.

Sept. 6—Filed Cost Bond on Appeal.

Sept. 6—Filed Pltfs' Designation of Contents of Record on Appeal.

Nov. 5—Record on Appeal (orig. pleadings & Exhs.) sent to Cir. Ct., via air mail.

Nov. 9—Filed Copy letter, Clerk, Cir. Court to Jones & Grey: Applic. for ext. time received; extension granted by Chief Judge Denman, Cir. Ct. (to 11/12/56).

[Endorsed]: Filed January 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America;

Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting here-

with all of the original papers, pleadings and exhibits in the above-entitled cause, pursuant to the Designation of Contents of Record on Appeal of Plaintiffs, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court, filed and entered on July 30, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (filed March 15, 1955).
2. Summons, with Marshal's Return of Service thereon, (filed March 23, 1955).
3. Answer (filed May 20, 1955).
4. Interrogatories Propounded to Defendant (filed February 21, 1956).
5. Objections to Plaintiffs' Interrogatories (filed February 28, 1956).
6. Affidavit of Mailing Objections (filed February 28, 1956).
7. Plaintiffs' Trial Memorandum (filed March 6, 1956).
- 7a. Defendant's Trial Memo.
8. Memo in support of Objections to Interrogatories (filed March 19, 1956).
9. Pretrial Order (filed and entered March 19, 1956).
10. Reporter's Transcript of Court's Oral Decision (filed March 28, 1956).
11. Plaintiffs' proposed Findings of Fact and Conclusions of Law (lodged June 13, 1956).

12. Reporter's Transcript of Proceedings (of March 19, 1956) (filed May 23, 1956).

13. Plaintiffs' Objections to Defendant's Proposed Findings of Fact and Conclusions of Law (filed June 13, 1956).

14. Notice of Presentation of Defendant's proposed Findings of Fact, etc. (filed July 10, 1956).

15. Affidavit of Mailing Notice of Presentation (filed July 10, 1956).

16. Offer of Proof (filed July 30, 1956).

17. Findings of Fact and Conclusions of Law (filed and entered July 30, 1956).

18. Judgment (filed and entered July 30, 1956).

19. Memorandum of Costs (filed August 3, 1956).

20. Affidavit of Mailing of Cost Bill (filed August 3, 1956).

21. Notice of Appeal (Plaintiffs') (filed Sept. 6, 1956).

22. Cost Bond on Appeal (filed September 6, 1956).

23. Designation of Contents of Record on Appeal (of Pltfs') (filed September 6, 1956).

I do further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits admitted in evidence in the trial of the above-entitled Cause, to wit:

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, and
Defendant's Exhibits Nos. A, B, C, D, and E.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and

charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal, Plaintiffs': \$5.00, and that the said fee has been paid to the Clerk of Plaintiffs.

° In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court at Tacoma, Washington, this 5th day of November, 1956.

[Seal]

MILLARD P. THOMAS,

Clerk;

By /s/ E. E. REDMAYNE,

Deputy.

[Endorsed]: No. 15350. United States Court of Appeals for the Ninth Circuit. William B. Cammarano and Louise Cammarano, His Wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: November 6, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15350

WILLIAM B. CAMMARANO and LOUISE CAM-
MARANO, His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellants hereby designate the following Statement of Points on which they intend to rely in their appeal from the judgment of the United States District Court, District of Washington, Southern Division, made and entered July 30, 1956, in Docket No. 1873 of said Court:

I.

The District Court erred in determining that Treasury Regulations III, Section 29.23(o)-1, was applicable to the expenditures of plaintiffs, which expenditures were incurred in connection with measures voted upon by the people.

II.

Even if Treasury Regulations III, Section 29.23 (o)-1, be applicable to expenditures incurred in connection with measures voted upon by the people, the District Court erred in determining that said Regulation as applied to plaintiffs' expenditures was a

valid exercise of the rule-making power of the Commissioner of Internal Revenue.

III.

The District Court erred in failing to determine that plaintiffs' expenditures, which expenditures were made to preserve the very life of plaintiffs' business, as a matter of law were ordinary and necessary expenses paid or incurred during the taxable year in carrying on plaintiffs' business.

IV.

The District Court erred in determining that Treasury Regulations III, Section 29.23(o)-1, either as applied to expenditures incurred in connection with measures voted upon by the people or as applied to expenditures made to preserve the very life of plaintiffs' business, had the force of law.

/s/ WALTER HOFFMAN,
Counsel for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed November 21, 1956.

[fol. 134] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
June 11, 1957 (Omitted in printing)

[fol. 135] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: ORR, POPE and FEE, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND
FILING AND RECORDING OF JUDGMENT—July 8, 1957

Ordered that the typewritten opinion this day rendered
by this Court in above cause be forthwith filed by the Clerk,
and that a Judgment be filed and recorded in the minutes
of the Court in accordance with the opinion rendered.

[fol. 136] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,350

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, His Wife,
Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

OPINION—July 8, 1957

Before: ORR, POPE, and FEE, Circuit Judges

ORR, Circuit Judge:

Appellants, partners in a wholesale beer distributing con-
cern in Tacoma, Washington, made a contribution to the
Washington Beer Wholesalers Association, Inc., Trust

Fund. The Trust Fund had been established December 17, 1947, to carry on an extensive state-wide publicity program, directed by an Industry Advisory Committee, on behalf of wholesale and retail beer and wine dealers to defeat proposed initiative legislation in the State of Washington. The measure, if enacted into law, would have placed the retail sale of wine and beer exclusively in state owned and operated stores.¹

The Association assessed its members amounts based upon their volume of business. The funds received from [fol. 137] the contributions, appellants' contribution included, were used in an effort to defeat the initiative legislation.

On their income tax returns appellants claimed a deduction for the contribution made as an ordinary and necessary business expense within the meaning of § 23(a)(1)(A), Internal Revenue Code of 1939.² The Commissioner of Internal Revenue disallowed this deduction on the ground that the contribution was used for lobbying purposes and the promotion or defeat of legislation, and therefore within the prohibition contained in Treasury Regulations 111, § 29.23(o)-1, in force and effect at the time the payment was made. Following payment of the assessed deficiency and a claim for refund, this suit for refund followed.

The regulation reads:

Sec. 29.23(o)-1. *Contributions or Gifts by Individuals.*—

¹The ballot title of the Initiative provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

Sec. 23 DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

(a) EXPENSES.—

(1) TRADE OR BUSINESS EXPENSES.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

The field encompassing the force and effect of the lobbying regulation set out above has often been plowed; but there exists no straight furrow which leads unerringly to the proper solution of all cases. The regulation has quite often been held to preclude deductions made for moneys spent to defeat legislation.³ Of course, the particular facts of each case govern.

[fol. 138] Unquestionably the regulation is broad enough to exclude deductions for any and all sums spent for lobbying and the promotion or defeat of legislation, and the Government insists that the courts have sustained the validity of the regulation in that broad sense. The case of *Textile Mills Corp. v. Commissioner*, 1941, 314 U.S. 326, is relied on by the Government.⁴ It is argued by appellants, with some force, that *Textile Mills*, as an authority, should be restricted to the facts of that particular case, and that the ban against deductions of amounts spent for lobbying as ordinary and necessary expenses is valid only where they

³ See *Textile Mills Corp. v. Commissioner*, 1941, 314 U.S. 326; *Sunset Scavenger Co. v. Commissioner*, 9 Cir., 1936, 84 F.2d 453; *Revere Racing Assn. v. Scanlon*, 1st Cir., 1956, 232 F.2d 816; *American Hardware & Eq. Co. v. Commissioner*, 4 Cir., 1953, 202 F.2d 126, cert. denied 346 U.S. 814 (1953); *Roberts Dairy v. Commissioner*, 8 Cir., 1952, 195 F.2d 948, cert. denied, 344 U.S. 865 (1952).

⁴ In *Textile Mills*, the Supreme Court held that the expenses of lobbying and propaganda, paid by a corporation employed by certain German textile interests to secure legislation from Congress authorizing the recovery of German properties seized during the First World War, were not deductible. The Court there related the lobbying regulation to ordinary and necessary business expenses, and rejected the contention that the limitation was not applicable to such expenses because it was included as a regulation under § 23(n), Internal Revenue Code of 1939, but was not specifically included as a regulation under § 23(a) of the Act.

arise "from that family of contracts to which the law has given no sanction." 314 U.S. at 339. However, other language in *Textile Mills* characterizes the words "ordinary and necessary" as used in the statute, as not being "so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation." 314 U.S. at 338. We think it may reasonably be gathered from a reading of *Textile Mills* that the Commissioner, in segregating sums paid for lobbying as non-deductible as ordinary and necessary business expenses, acted within the proper exercise of his rule-making power.

This court in the case of *Sunset Scavenger Co. v. Commissioner*, 9 Cir., 1936, 84 F.2d 455, decided prior to *Textile Mills*, held that an association of scavengers in San Francisco could not deduct expenses incurred in combatting an ordinance which would have seriously affected their business. In its decision this court relied on the doctrine of statutory re-enactment in the face of a known administrative interpretation to sustain the lobbying regulation, as well as the latent ambiguity of the phrase, "ordinary and necessary business expenses."

[fol. 139]. In *American Hardware v. Commissioner*, 4 Cir., 1953, 202 F.2d 126, cert. denied, 346 U.S. 814 (1953), the regulation was applied to disallow deductions for payments by a hardware company to the National Tax Equality Association, which issued propaganda on the subject of tax revision. The court there held that *Textile Mills* controlled, rejecting contentions that *Textile Mills* was limited to the non-deductibility of items which are against public policy or are morally wrong, and that the lobbying regulation was inapplicable to ordinary business expenses since not specifically appended to § 23(a).

In *Revere Racing Association v. Scanlon*, 1 Cir., 1956, 232 F.2d 816, the regulation was again applied to disallow payments by a dog racing company for the defeat of a public referendum on the question of whether pari-mutuel system of betting at dog races would be continued in the county. There, the court rejected the contention that the regulation was inapplicable where the measure was before the people upon referendum, rather than before a legislature.

Appellants cite *Commissioner v. Heininger*, 1943, 320 U.S. 467, and *Lilly v. Commissioner*, 1952, 343 U.S. 90, both decided subsequent to *Textile Mills*, as limiting the scope of *Textile Mills* to payments violating public policy.

In *Commissioner v. Heininger*, a mail order dentist was allowed a deduction as ordinary and necessary business expenses for legal fees incurred in an unsuccessful contest of a fraud charge lodged by the Postmaster. In *Lilly v. Commissioner*, an optician was allowed business expense deductions for kick-backs to a prescribing physician, where the practice was customary.

Those cases are distinguishable in that the regulation here involved was not applicable; there was no lobbying involved. In *Lilly v. Commissioner*, the Supreme Court expressly distinguishes *Textile Mills* on the ground that in the earlier case an interpretative regulation had been in effect for many years with Congressional acquiescence. 343 U.S. at 95.

This court in *Sunset Scavenger v. Commissioner*, 9 Cir., 1936, 84 F.2d 453, held that the doctrine of statutory reenactment in the face of a known administrative interpretation applied in that case. We think that doctrine can be [fol. 140] said to apply with equal force in the instant case.⁵ What we have said sustains an affirmance of the judgment, but there is also another reason which also requires an affirmance. The trial court found that:

⁵ The lobbying regulation assumed its present form in Article 562 of Treasury Regulations 45 (1919 ed.), promulgated under the Revenue Act of 1918, and has since appeared without change, in all successive Regulations. See Article 562 of Treasury Regulations 45 (1920 ed.), 62, 65 and 69; promulgated under the Revenue Acts of 1918, 1921, 1924, and 1926, Article 262 of Treasury Regulations 74 and 77 (1929 and 1937 eds.), promulgated under the Revenue Acts of 1928 and 1932, Article 23(o)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 23(q)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 23(o)-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, Sections 19.23 (o)-1, 29.23(o)-1, and 39.23(o)-1 of Treasury Regulations 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939, and Section 1.162-15 of the proposed Income Tax Regulations under the Internal Revenue Code of 1954.

"9. There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear. In any event, the measure was defeated."

This is a finding that appellants failed to sustain their burden of establishing by a preponderance of the evidence that the passage of the initiative would have impaired its business as a beer distributor.

Judgment Affirmed.

[File endorsement omitted]

[fol. 141] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No: 15,350.

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Entered July 8, 1957

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 142] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: ORR, POPE and FEE, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC—October 15, 1957

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellants, filed August 27, 1957, and within time allowed therefor by rule of Court and valid extension thereof, for a rehearing and rehearing en banc, be, and each of them hereby is denied.

[fol. 143] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 144] SUPREME COURT OF THE UNITED STATES
No. 718, October Term, 1957

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
his wife, Petitioners,

v.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—March 3, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PLAINTIFFS' EXHIBIT 1

UNITED STATES OF AMERICA

STATE OF WASHINGTON

DEPARTMENT OF STATE

[EMBLEM]

To All to Whom These Presents Shall Come

I, EARL COE Secretary of State of the State of Washington and custodian of the Seal of said State, do hereby certify that the annexed is a true and correct copy of the Articles of Incorporation of "Pacific Northwest Beverage Distributors, Inc." and of all amendments thereto including amendatory articles showing change of name to WASHINGTON BEER WHOLESALERS ASSOCIATION, INC., which have been duly filed and recorded in my office in accordance with law. I further certify that the above named corporation is organized as a nonprofit corporation and is therefore exempt from payment of any annual license fees to this office.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington, Done at the Capitol, at Olympia, this 15th day of February, A. D. 1956

s/ EARL COE

Secretary of State

By s/ RAY J. YEOMAN

Assistant Secretary of State

[SEAL]

ARTICLES OF INCORPORATION
OF

PACIFIC NORTHWEST BEVERAGE DISTRIBUTORS, INC.

KNOW ALL MEN BY THESE PRESENTS, That we, all being citizens of the United States, residents in and citizens of the State of Washington, do hereby associate ourselves together for the purpose of forming a corporation under the general incorporation laws of the State of Washington for corporations not formed for profit, being specifically Remington's Compiled Statutes, Sections 3888-3900, to be known as PACIFIC NORTHWEST BEVERAGE DISTRIBUTORS, INC., and for that purpose do hereby certify and adopt, in triplicate, the following as our Articles of Incorporation.

ARTICLE I.

Section 1. The corporate name of this corporation shall be PACIFIC NORTHWEST BEVERAGE DISTRIBUTORS, INC.

ARTICLE II.

Section 1. The principal office of this corporation shall be located at Seattle, in the State of Washington.

ARTICLE III.

Section 1. The purposes and objects for which this corporation is formed are to take full advantage of the rights and privileges granted under the Act of Congress known as "National Industrial Recovery Act" and entitled: "An Act to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of co-operative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the

consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The corporation shall have enlisted in its membership beverage distributors of any and every description which come under the provisions of the Alcoholic Beverage Wholesale Industry Code of Fair Competition.

It shall be the purpose of this organization to promote orderly and fair dealings in beverages covered by the Code of Fair Competition for the Alcoholic Beverage Wholesale Industry; to pay fair wages to those employed in the industry; to promote the establishment and maintenance of price levels that are fair to brewers and manufacturers, distributors, retailers and consumers and protect the distributors against unfair practices of any and every kind and to prevent encroachment from others; to set up standard prices, codes of ethics and rules under which its members shall operate for their mutual benefit and the benefit of the industry as a whole; to eliminate unfair competition and to do any and all things necessary or incidental to the protection and mutual welfare of the distributors including the following:

(a) To formulate and prescribe terms of sale to be adhered to by its members and forms of contracts to be used by them in dealing with brewers and manufacturers and with the trade.

(b) To obtain and disseminate among its members and the trade information relative to or of value to distributors and to the trade.

(c) To set up standard practices, codes of ethics and rules under the National Industrial Recovery Act under which its members shall operate for their mutual benefit and the benefit of the industry as a whole, and to co-operate with the proper officials of the United States Government in enforcing and making effective such codes, rules, etc., as shall be adopted by the Government and/or Corporation.

(d) To make arrangements with the Secretary of Agriculture of the United States or other proper official for the

licensing of its members to operate under the code, rules and regulations as may be in effect from time to time.

(e) To negotiate terms, prices and other beneficial considerations from brewers and manufacturers.

(f) To do any and all things which any non-profit corporation formed under the general incorporation laws of the State of Washington may lawfully do, and which may be necessary, proper and convenient for carrying out or accomplishing any of the objects above specified.

(g) To acquire such personal property as may be necessary or incidental to the conduct of the corporation's business.

(h) To negotiate fair hours of labor and remuneration therefor with individuals, groups of individuals or organizations established for that purpose, and enforce any established labor or wage scales among its members.

The enumeration herein of specified powers shall not be deemed exclusive nor to affect the right of the corporation to exercise all or any other powers necessary or incidental to the accomplishment of its purposes.

ARTICLE IV.

Section 1. Any person, firm, corporation or partnership handling any beverages in the States of Washington, Oregon, Idaho and Montana and the Territory of Alaska which come under the provisions of the Code of Fair Competition for the Alcoholic Beverage Wholesale Industry, shall be eligible for membership in this corporation.

ARTICLE V.

This corporation shall not engage in any business, trade, vocation, avocation or profession for gain or profit.

ARTICLE VI.

The term of existence of this corporation shall be fifty years from and after the date of its incorporation unless its existence be sooner terminated as provided by law.

ARTICLE VII.

In the event of dissolution of this corporation, the assets thereof, after paying all debts, shall be distributed ratably and proportionately to the amount in membership fees, dues or assessments paid in by each member to the members of the corporation who have for a period of twelve months immediately prior to the said dissolution been members of the said corporation in good standing.

ARTICLE VIII.

Section 1. The trustees of this corporation shall be not less than two nor more than eighteen in number, the exact number to be specified by the By-Laws of the corporation from time to time.

Section 2. The Board of Trustees of this corporation who shall manage the business of this corporation until the 10th day of April, 1934, shall be:

V. J. Greene,	317-19 Nickerson Street, Seattle.
Wm. E. Quast,	Occidental & Main, Seattle.
Robt. R. Fox, Jr.	815-817 First Avenue, Seattle.
P. F. Glaser	2900 First Ave. South, Seattle

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 6th day of February, 1934.

s/ V. J. GREENE

s/ WM. E. QUAST

s/ ROBT. R. FOX, JR.

.....
s/ RAYMOND HOWIE

STATE OF WASHINGTON)
COUNTY OF KING)

ss

THIS IS TO CERTIFY that on the 6th day of February, 1934, before me the undersigned, A Notary Public in and for the State of Washington, duly commissioned and sworn, per-

sonally came V. J. Greene, Wm. E. Quast, Robt. R. Fox, Jr., P. F. Glaser and Raymond Howie to me known to be the individuals described in and who executed the within instrument and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year above written.

s/ EDWARD—Illegible

NOTARY PUBLIC in and for the
State of Washington, residing
at Seattle.

AMENDMENT TO ARTICLES OF INCORPORATION

THIS IS TO CERTIFY that at a special meeting of the members of PACIFIC NORTHWEST BEVERAGE DISTRIBUTORS, INC., a non-profit, no stock Washington Corporation, held in Seattle, Washington, on January 25, 1946, pursuant to the provisions of its Articles of Incorporation and By-Laws, and in accordance with the provisions of the Laws of the State of Washington, the Amendment to the Articles of Incorporation hereinafter stated was adopted unanimously by the members, which said Amendment is as follows:

"ARTICLE 1

Section 1.

The corporate name of this corporation shall be WASHINGTON BEER WHOLESALERS ASSOCIATION, INC."

IN WITNESS WHEREOF, this Certificate has been signed this 14th day of October 1946.

s/ S. S. ELAND
President

s/ ROLLE R. CAMPLIN
Secretary

(Corporate seal)

(Rubber Stamp) Approved and filed—November 14, 1946—Belle Reeves, Secretary of State—by s/ Ray J. Yeoman, Assistant Secretary of State.

STATE OF WASHINGTON)
COUNTY OF KING) ss

This is to certify that on this 14th day of October, 1946, before me, a Notary Public in and for the State of Washington, personally appeared SID ELAND and ROLLE R. CAMPLIN, to me known to be the President and Secretary, respectively, of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed thereto is the seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

s/ T. M. MOTTER
Notary Public in and for the State
of Washington, residing at Kirkland

No. 104720

Amended
ARTICLES OF INCORPORATION
OF THE

Pacific Northwest Beverage Distributors, Inc.
(Changing name to Washington Beer Wholesalers Association, Inc.)

Place of business Seattle, Wn.

Time of existence 50 years

Capital stock, \$ None

STATE OF WASHINGTON, ss.

Filed for record in the office of the Secretary of State
November 14, 1946 at 10:40 o'clock A. M. Recorded in Book
371 Page 49-50

DOMESTIC CORPORATIONS

s/ BELLE REEVES
Secretary of State

Filed at request of

Pacific Northwest Beverage Distributors, Inc.
1024 Dexter Horton Building
Seattle, Wn.

Filing and recording fee, \$10.00

License to June 30, 19 \$

Certificate mailed Nov 19 1946

to above address.

INDEXED

PHOTOGRAPHED

S.F. No. 1108 4 45 5M 8611

PLAINTIFFS' EXHIBIT 4

1489M—Dec. 1947

TREASURY DEPARTMENT
WASHINGTON 25

[EMBLEM]

OFFICE OF
COMMISSIONER OF INTERNAL REVENUEADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO
IT:P:ER
BWL

Jun 15 1949

Washington Beer Wholesalers
Association, Inc.
805 Insurance Building
Seattle 4, Washington
Gentlemen:

It is the opinion of this office, based upon the evidence presented, that you are exempt from Federal income tax under the provisions of section 101(7) of the Internal Revenue Code and corresponding provisions of prior revenue acts.

Accordingly, you will not be required to file income tax returns unless you change the character of your organization, the purposes for which you were organized, or your method of operation. Any such changes should be reported immediately to the collector of internal revenue for your district in order that their effect upon your exempt status may be determined.

You will be required, however, to file annually an information return on Form 990 with the collector of internal revenue for your district so long as this exemption remains in effect. This form may be obtained from the collector and is required to be filed on or before the 15th day of the

fifth month following the close of your annual accounting period.

The collector of internal revenue for your district is being advised of this action.

Bureau ruling dated September 3, 1937, addressed to you under your former name, Pacific Northwest Beverage Distributors, Inc., holding you exempt under the provisions of section 101(7) of the Revenue Act of 1936 is hereby affirmed.

Bureau letter to you dated February 11, 1949, in which you were advised that inasmuch as you had failed to establish that you are entitled to an exempt status you should file income tax returns, is hereby revoked.

By direction of the Commissioner.

Very truly yours,

s/ E. J. McLARNEY
Deputy Commissioner

PLAINTIFFS' EXHIBIT 7

**The Advertising Campaign
Against Initiative 13
in Daily & Weekly Newspapers**

DEFENDANT'S EXHIBIT B

(See Opposite) 

Note

Pages 152 to 161 are
on Card 4;

Pages 162 to 165 are
on Card 5

DEFENDANT'S EXHIBIT B

The **MOCKERY** of *Prohibition*

A Story of Special Importance to Every Washington Citizen,
Written by One of America's Outstanding Newspapermen.

Grateful Acknowledgment is made to the Chicago Tribune and to Mr. Clayton Kirkpatrick for permission to re-publish the following series of articles.

The marginal notations are *not* part of the original text. Any pointed reference to the failure and evils of Prohibition, are strictly *intentional*.

This booklet was prepared and distributed by

CITIZENS LIQUOR CONTROL COUNCIL, INC.

*An Organization of Washington Citizens, Devoted to Liquor Control
that is in the Public Interest, and Opposed to
the Return of Prohibition.*

KANSAS, OKLAHOMA, MISSISSIPPI

BONE "DRY" BY LAW,

SOAKING "WET" IN PRACTICE

Washington Prohibitionists Also Planning Campaign Here

THIS BOOKLET is respectfully dedicated to you readers who remember the graft and corruption of the '20s and early '30s, the direct result of Prohibition.

The same evils that today beset Kansas, Oklahoma and Mississippi, are again threatening the State of Washington—through steps being taken now by Washington drys, which would return to our state speakeasies, illegal dives, political corruption and graft, and ultimately all of the evils of "bone-dry," state-wide prohibition.

It is not only possible, but extremely probable that, unless the citizens of this state awaken to the danger, Prohibition, partially now, and completely at a later date, may be forced on Washington State once again. The Drys have re-assembled their forces and are on the march once more. Not long ago, Mrs. D. Leigh Colvin, national president of the W. C. T. U., visited Seattle and in an interview, predicted that, "we'll have prohibition in five to ten years."

Recently, at a Prohibition meeting in Yakima, one of the leaders of the Washington Dry forces voiced his and other Prohibitionists' hopes for a "dry" Washington. "I stand for . . . state or national prohibition, any or all we can get."

When you read Mr. Kirkpatrick's report, keep in mind that the same consequences of Prohibition could easily be thrust upon the State of Washington, unless we, its citizens, are alert and resist the new effort of Prohibitionists to gain a foothold here.

Note

Pages 170 to 179 are
on Card 5;

Pages 180 to 181 are
on Card 6

THE FACTS about Kansas, Oklahoma and Mississippi are shocking. It seems fantastic that such conditions can exist in a nation whose people believe in law and order.

Yet, remote as it seems at this time, Prohibition, speakeasies and illegal dives—the only alternatives to the legal tavern—can return to the State of Washington, if the prohibitionists put over their first step—that of prohibiting the sale of beer and wine in taverns, groceries, and restaurants.

Beware of Prohibition propaganda—it's tricky, false, misrepresents facts. No matter what they say or deny, the Drys do want total Prohibition in Washington State.

Do not trust a Prohibition movement that admits through a leader its intent to deceive. William E. (Pussyfoot) Johnson, well known Prohibition propagandist, in his article, "I Had to Lie, Bribe and Drink to Put Over Prohibition," in *Cosmopolitan Magazine*, May, 1926 confessed:



"Did I ever lie to promote Prohibition? Decidedly, yes. I have told enough lies 'for the cause' to make Ananias ashamed of himself. The lies that I have told would fill a big book."

CITIZENS LIQUOR CONTROL COUNCIL, INC.

Eley P. Denson, *President*

Joshua Green Bldg., Seattle

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 50

F. STRAUSS & SON, INC. OF ARKANSAS,
PETITIONER;

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1958
CERTIORARI GRANTED MAY 26, 1958

United States Court of Appeals FOR THE EIGHTH CIRCUIT

No. 15,864

TAX REVIEW.

F. STRAUSS & SON, INC. OF ARKANSAS,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION TO REVIEW DECISION OF
THE TAX COURT OF THE UNITED STATES

FILED AUGUST 28, 1957

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[fol. 1]

Docket Entries.

F. Strauss & Son, Inc. Of Arkansas, Petitioner,

Docket No. 53669

vs.

Commissioner Of Internal Revenue,
Respondent.

Appearances:

For Petitioner: E. Chas. Eichenbaum, Esq., Leonard L. Scott, Esq., W. S. Miller, Jr. Esq., J. S. Garelick, C.P.A.

For Respondent: John P. Higgins, Esq.

1954

Jun. 28—Petition received and filed. Taxpayer notified.
Fee paid.

Jun. 29—Copy of petition served on General Counsel.

Jul. 9—Entry of appearance of J. S. Garelick, as counsel
filed.

Aug. 25—Answer filed by General Counsel.

Aug. 25—Request for hearing in Little Rock, Ark. filed by
General Counsel.

Aug. 26—Notice issued placing proceeding on Little Rock,
Ark. calendar. Service of Answer and Request
made.

1956

Aug. 16—Hearing set Dec. 3, 1956, Little Rock, Ark.

Dec. 6—Trial had before Judge Bruce—case submitted—
Stipulation of facts, filed at hearing. Briefs due
3/6/57; Replies due 4/6/57.

Dec. 26—Transcript of Hearing 12/6/56 filed.

1957

Mar. 5—Motion for extending time to March 25, 1957 to file brief, filed by Respondent.

Mar. 6—Order—granting motion and time for filing briefs is extended to March 25, 1957 and the time for filing reply briefs is extended to April 8, 1957, entered. Served 3/11/57.

Mar. 13—Motion for extension of time to April 15, 1957 to file brief, filed by petitioner. Served 3/19/57.

Mar. 18—Order extending time to April 15, 1957 to file original briefs and May 6, 1957 to file reply briefs, entered. Served 3/19/57.

Apr. 15—Brief filed by petitioner. Served 4/16/57.

Apr. 15—Brief filed by respondent. Served 4/16/57.

Apr. 29—Reply Briefs filed by petitioner.

May 31—Findings of Fact and Opinion rendered. Judge Bruce. Decision will be entered that there is a deficiency of \$10,386.12.

Served 6/4/57.

Jun. 4—Decision entered. Judge Bruce. Div. 6. Served 6/6/57.

Aug. 2—Petition for Review by U. S. Court of Appeals for the Eighth Circuit—Designation of Contents of Record with certificate of Service attached, filed by petitioner.

[fol. 2] (Petition of F. Strauss & Son, Inc., of Arkansas.)

(Received and Filed Jun. 18, 1954, The Tax Court of the United States.)

The Tax Court of the United States.

F. Strauss & Sons, Inc. of Arkansas, Petitioner,

Docket No. 53669 vs.

Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated April 8, 1954, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation, organized under the laws of the state of Arkansas, with its principal place of business at 223 East Markham Street, Little Rock, Arkansas. The return for the period here involved was filed with the Collector of Internal Revenue for the district of Arkansas.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on April 8, 1954.

3. The Commissioner determined deficiency in income tax for the calendar year 1950 in the amount of \$20,990.36, of which the entire amount is in controversy.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erroneously determined that a deduction in the amount of \$9,252.67, claimed in petitioner's return for a contribution made to Arkansas Legal Control Associates, Inc., should be disallowed.

(b) The Commissioner erroneously determined that the [fol. 3] petitioner, for the taxable year 1950, was availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its earnings and profits to accumulate beyond the reasonable needs of its business, and that petitioner is liable for the surtax imposed by Section 102 of the Internal Revenue Code.

5. The facts upon which the petitioner relies are as follows:

(a)—(1) In 1950, petitioner paid to Arkansas Legal Control Associates, Inc. the sum of \$9,252.67, and claimed said amount as a deduction on its income tax return.

(2) Said payment is properly deductible as a contribution under the provisions of Section 23 (q), Internal Revenue Code.

(3) Alternatively, said deduction of \$9,252.67 constitutes an ordinary and necessary expense paid or incurred during the taxable year by the petitioner in carrying on its trade or business, and is fully allowable under the provisions of Section 23 (a)(1)(A), Internal Revenue Code.

(b)—(1) Petitioner was not formed, or availed of, for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation.

(2) The earnings and profits of the petitioner have not been permitted to accumulate beyond the reasonable needs of petitioner's business.

(3) The earnings and profits of the petitioner have not been permitted to accumulate for the purpose of avoiding the surtax upon its shareholders or the stockholders of any other corporation.

(4) The earnings and profits of the petitioner have been required for the reasonable needs of the business at and [fol. 4] during all times relevant to this proceeding.

Wherefore, petitioner prays that the Court may hear the proceeding, and disallow the deficiency in full.

E. CHAS. EICHENBAUM
LEONARD L. SCOTT
W. S. MILLER, JR.

Attorneys for Petitioner,
Boyle Building
Little Rock, Arkansas.

J. S. GABELICK
212 Arkansas Avenue,
Monroe Louisiana of Counsel.

(Served Jun. 29, 1954.)

[fol. 5]

Verification

State of Arkansas

County of Pulaski, ss.

.. Charles Cone, being duly sworn, says that he is the Secretary and Treasurer of F. Strauss & Son, Inc. of Arkansas, the petitioner above named, and as such, authorized to verify the foregoing petition; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be on information and belief, and that those he believes to be true.

CHARLES CONE

Subscribed and sworn to before me this 23 day of June, 1954.

ELEANOR H. BERRYMAN

(Seal)

Notary Public

My Commission Expires: 10/2/54.

[fol. 6]

Exhibit "A"

U. S. Treasury Department
Office of the District Commissioner
Internal Revenue Service
Appellate Division
516 Oklahoma Natural Building,
Oklahoma City 2, Oklahoma.

Apr. 8—1954

F. Strauss & Son, Inc. of Arkansas
223 East Markham Street
Little Rock, Arkansas

Registered Mail

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1950,

discloses a deficiency of \$20,990.36 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form in duplicate and return both copies to the Dallas Region, Appellate Division, 516 Oklahoma Natural Building, Oklahoma City, Oklahoma. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS
Commissioner

By William G. Cullen
Assistant Regional Commissioner Appellate

Enclosures:
Statement
Form 1276
Agreement Form

[fol. 7] F. Strauss & Sons, Inc. of Arkansas
Year Ended 12/31/50

Schedule 1-A.

Explanation of Adjustment.

(a) A deduction of \$9,252.67 claimed in your return for a contribution of that amount to Arkansas Legal Control Associates, Inc. is herein disallowed. It has been determined that the claimed deduction is not allowable under either section 23(a)(1)(A) or section 23(q) of the Internal Revenue Code.

Schedule 2.

Computation of Alternative Tax
Year Ended 12/31/50

Net income adjusted (Schedule 1)	\$225,884.06
Less: Dividends received credit (85% of \$8,000.00)	6,800.00
Surtax net income	\$219,084.06
Less: Excess of net long-term capital gain over net short-term capital loss	21,049.96
Surtax net income for purpose of alternative tax	\$198,034.10
Combined normal tax and surtax: 42% of \$219,084.06, less \$4,750.00	\$ 78,424.32
Partial tax	\$ 78,424.32
Tax on long-term capital gain (25% of \$21,049.96)	5,262.49
Alternative tax	\$ 83,686.81

Schedule 3.

Computation of Income Tax
Year Ended 12/31/50

Net income adjusted (Schedule 1)	\$225,884.06
Less: Dividends received credit (85% of \$8,000.00)	6,800.00
Surtax net income	\$219,084.06

Combined normal tax and surtax:	
42% of \$219,084.06, less \$4,750.00	\$ 87,265.31
Alternative tax (Schedule 2)	\$ 83,686.81
Income tax liability (lesser of ordinary and alternative taxes)	\$ 83,686.81
Section 102 Surtax (Schedule 4)	17,104.24
Total income tax and Section 102 Surtax	\$100,791.05
Income tax liability	\$100,791.05
Income tax assessed	79,800.69
Deficiency of income tax	\$ 20,990.36

[fol. 8] Schedule 4.

Computation of Section 102 Surtax Liability
Year Ended 12/31/50

Net income adjusted (Schedule 1)	\$225,884.06
Less: Federal income tax (Schedule 3)	83,686.81
Section 102 net income	\$142,197.25
Less: Taxable dividends paid	80,000.00
Undistributed Section 102 net income	\$ 62,197.25
Surtax on \$62,197.25 at 27½%	\$ 17,104.24

[fol. 9] Statement.

F. Strauss & Son, Inc. of Arkansas
223 East Markham Street
Little Rock, Arkansas

Tax Liability For The Taxable Year Ended
December 31, 1950

Income Tax.

Year	Deficiency
1950	\$20,990.36

In making this determination of your income tax liability, careful consideration has been given to the report of

examination dated June 30, 1953; to your protest dated August 3, 1953; and to statements made at the conference held on February 16, 1954.

It has been determined that this corporation, for the taxable year 1950, was availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its earnings and profits to accumulate beyond the reasonable needs of its business instead of being divided or distributed. It is therefore held that the corporation, for the taxable year 1950, is liable for the surtax imposed by Section 102 of the Internal Revenue Code.

Schedule 1.

Adjustments to Net Income	
Net income as disclosed by return	\$216,631.39
Unallowable deduction:	
(a) Contribution to Arkansas Legal Control Associates, Inc.	9,252.67
Net income adjusted	\$225,884.06

[fol. 10] (Answer of Commissioner of Internal Revenue)
(Filed Aug. 25, 1954, The Tax Court of the United States.)

Comes now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. (a), (b). Denies that the Commissioner committed the errors alleged in paragraph 4 and subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a), (1), (2), (3). Admits that in 1950 petitioner claimed \$9,252.67 as a deduction on its income tax return, but denies the remaining allegations contained in paragraph 5(a) and subparagraphs (1), (2) and (3) of paragraph 5(a) of the petition.

[fol. 11] 5(b), (1), (2), (3), (4). Denies the allegations contained in subparagraphs (1), (2), (3) and (4) of paragraph 5(b) of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved.

DANIEL A. TAYLOR,
Chief Counsel,
Internal Revenue Service.

Of Counsel:

James L. Backstrom,
Regional Counsel;
E. G. Sievers,
Asst. Regional Counsel;
John P. Higgins,
Special Attorney,
Internal Revenue Service

[fol. 11a] Narrative Statement of Stipulation of Facts,
Exhibits Thereto and Testimony.

Filed Sep. 23, 1957, E. E. Koch, Clerk.

In the United States Court of Appeals,
Eighth Circuit.

F. Strauss & Sons, Inc. of Arkansas, Petitioner,
No. 15864. vs.
Commissioner of Internal Revenue, Respondent.

The Stipulation provided:

1. A copy of the 1950 corporation income tax and excess profits tax return of F. S. Strauss & Son, Inc., of Arkansas

was attached as Joint Exhibit 1-A. This return showed total income of \$476,041.45 including a net long-term capital gain of \$21,049.96, total deductions of \$259,410.06, including \$9,252.67 paid to Arkansas Legal Control Associates, Inc., leaving a net income of \$216,631.39, which, after a dividends received credit of \$6,800.00 left a surtax net income of \$209,831.39. The tax liability, computed on the alternate basis, was \$79,800.69.

2. A copy of the constitution and charter of the Arkansas Legal Control Associates, Inc., was attached as Joint Exhibit 2-B. This reflected, among other things, the following:

"Article II. Objects And Purposes. Section 1. The objects and purposes for which this organization is formed and the powers and rights which it shall exercise and enjoy are: To foster and promote in every and any lawful manner the interests of persons, firms, associations, corporations and others engaged or interested directly or indirectly in the alcohol beverage industry, or in any branch thereof, or in any industry or business alike or incidental thereto.

Section 2. In furtherance, but not in limitation, of the foregoing general purposes, it is expressly provided that the organization shall have the following powers:

(a). To uphold the freedom of every individual to determine, without injury to others, his personal tastes.

(b). To engage in educational and publicity campaigns and programs.

(c). To support improved regulatory laws governing the sale and use of alcohol beverage, and to uphold the system of private enterprise in the manufacture, distribution and sale of alcohol beverage.

(d). To provide honest opposition to the principles of prohibition and its resulting evils.

(e). To support related public relations programs.

(f). To collect and disseminate statistics and other information of interest to members and to the public.

(g). To conduct studies and research work on problems relating to or affecting alcohol beverage industry.

(h). To secure and present the views of the members to other organizations, governmental agencies and bodies, and the public.

(i). To further the common interests of its members in any and every lawful manner and to do everything necessary and proper for the accomplishment of the purposes hereinbefore set forth or which shall be recognized as proper and lawful objectives and purposes of a business league. . . .

Article V. Uses The corporation shall not be used for business purposes or make any contribution or expenditure in connection with any election at which Presidential or Vice Presidential electors or a Senator or Representative to Congress are to be voted for or in connection with any [fol. 11c] primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for the pecuniary gain or profit of its members, and no part of the net earnings of the corporation shall inure to the benefit of any member or private individual. The corporation may, however, support or oppose public laws or constitutional measures which its members and trustees deem against public interest and opposed to the purposes and objects of the corporation."

3. A copy of the Certificate of Incorporation of the Arkansas Legal Control Associates, Inc. was attached as Exhibit 3-C. This showed that the Constitution of the Arkansas Legal Control Associates, Inc. had been filed and that the organization was incorporated in the Circuit Court of Pulaski County, Arkansas, on May 3, 1950.

4. A copy of the initiative petition calling for an election on statewide prohibition was attached as Joint Exhibit 4-D. This Exhibit included a Certificate by the Secretary of State that the copy of the petition for a vote on statewide prohibition was a correct copy; that the Act had been placed

on the ballot and voted on at the general election held in Arkansas on November 7, 1950, and defeated at such election. The statewide prohibition act provided in part:

"Section 1: The Manufacture, Sale, Bartering, Loaning or Giving away of intoxicating liquor within the State of Arkansas for beverage purposes is hereby prohibited. The exportation from, the importation into, or the transportation within the State of Arkansas of more than one quart, at any time; of intoxicating liquor for beverage purposes is hereby prohibited. Having in possession more than one quart, at any time, of intoxicating liquor within the State of Arkansas for beverage purposes is hereby prohibited; and any such liquor found in possession of any person shall be confiscated by an order of a court of competent jurisdiction. Intoxicating liquor is hereby defined to include any beverage containing over 1/2 of 1% of alcohol by weight."

[fol. 11d] A copy of the summary of the audit report statement of income and expense for the period of activity of the Arkansas Legal Control Associates, Inc., was attached as Joint Exhibit 5-E. This audit statement showed for the period May 3, 1950 through November 30, 1950, contributions in the amount of \$126,265.84 and interest received of \$7.84, a total of \$126,273.68, with the total expenses of \$124,981.50, including \$100,374.60 paid to Brooks-Pollard Company for advertising. (An exact copy of this Exhibit is attached.)

6. A copy of the corporation income tax and excess profits tax return of the Arkansas Legal Control Associates, Inc., for the fiscal year ending April 30, 1951, was attached as Joint Exhibit 6-F. This reflected for the fiscal year beginning May 5, 1950 and ending April 30, 1951 net income of \$939.29, computed as follows:

Income

Contributions Received	\$126,265.84
Interest Received on Telephone Deposit	7.84
Total Income	<hr/> \$126,273.68

Expenses

Salary—Officer	2,450.00
Salaries—Others	7,324.97
Advertising—Brooks-Pollard Company	100,374.60
Advertising—Other	225.32
American Legion Bond Fund	3,000.00
Freight	58.97
Office Supplies	415.60
Postage	5,067.64
Printing	852.62
Rent—Rooms	1,873.32
Rent—Furniture and Equipment	375.73
Telephone	461.67
Travel	722.00
Social Security Taxes	143.82

[fol. 11e]

Expenses Continued

State Unemployment Compensation Taxes	258.52	
Auditing	350.00	
Attorney's Fees	1,200.00	
Miscellaneous Expense	179.61	
Total Expenses		\$125,334.39
Net Income		\$ 939.29

7. The activities of the Arkansas Legal Control Associates, Inc., included advertising in the following media: newspapers (30 daily papers and 142 weekly papers), radio, billboards and such miscellaneous activities as distribution of book matches, bar banners, special folders and press releases, copies of typical advertisements being attached to the original Stipulation as Joint Exhibits 7-G, 8-H, 9-I, 10-J and 11-K. Joint Exhibit 7-G reflected three newspaper advertisements, one run three times in October of 1950 in all 30 Arkansas daily newspapers, and the last two being run once in all 30 Arkansas daily newspapers, and once in all 141 Arkansas weekly newspapers in October of 1950. The first merely urged a vote against Initiated Act No. 2. Of the last two, one advertisement urged a vote against Initiated Act No. 2 and pointed out, among other things, that defeat would let Arkansas retain its present system of permitting each County to handle alcohol beverages as it chose; the other pointed out that the one quart provision was in effect a bootlegger's license to do business. (Joint

Exhibit 7-G is reproduced in full and attached). Joint Exhibit H-8 reflected advertisements run in the Arkansas Farmer October and November of 1950. One of these merely urged a vote against prohibition and Initiated Act No. 2. Another listed numerous firms, business men and civic leaders fighting against passage of initiated Act No. 2 and also urged:

"The voters of Arkansas on November 7th will make a vital and far-reaching decision: Shall we retain our proven, workable legal control of alcohol beverages or adopt the [fol. 11f] proposed local option plan that would only bring back the evils of Prohibition?

Our committee is composed of citizens of Arkansas men and women interested only in the welfare of our state. We do not believe the question is whether you are "wet" or "dry", but whether you want alcohol beverages sold legally or illegally.

Passage of Initiated Act No. 2 means complete Prohibition for Arkansas. It would replace legal sale with illegal sale . . . stir up conflict between friends and neighbors, within organizations, between communities.

The State of Arkansas and its communities would lose more than \$6,000,000 annual revenue from the taxes on alcohol beverages. The State would lose approximately 12% of its total annual tax revenue—money needed for our charitable institutions, schools, teachers, and welfare rolls.

Above all, Prohibition on a local, state, national or any level has never worked and never will. And it won't work here in Arkansas. Prohibition breeds lawlessness and crime, drives home-town trade away to nearby legal sale communities.

Arkansas already has strong and workable control law. Full authority rests in the hands of local officials to control and regulate the handling of alcohol beverages.

We urge every citizen to join with Arkansas Against Prohibition to retain our strong control law, to retain our tax, agricultural, and economic benefits. Vote Against Act No. 2—the last measure on the ballot!

**Let's Protect the Farm Income Received from
67 Million
Pounds of Arkansas Rice**

Prohibition would strike directly at Arkansas farmers who annually sell more than 67,000,000 pounds of Arkansas rice to the brewing industry. Arkansas is the third highest rice producer of the nation—the brewing industry is its best customer. Lets protect this crop and its market.

Vote Against Act No. 2 on November 7th!"

Exhibit 9-I reflected certain supplemental newspaper advertisement noting, among other things, that under Section 4 of the Act any person who furnishes or rents a building or house used in violation of Section 1 would be guilty as a principal, and noting that innocent owners or landlords could be thereby victimized. It also pointed out that Arkansas Farmers now sell \$3,000,000 of rice annually to brewing industries and that Initiated Act No. 2 would cause a loss of this income. Exhibit 10-J reflected an outdoor poster shown on 285 outdoor boards throughout the State of Arkansas. The poster urged a vote against Act No. 2 and the defeat of prohibition. Exhibit 11-K reflected a full page advertisement run October 12, 1950 in all the 141 Arkansas weekly newspapers. This advertisement showed a list of numerous people in Arkansas opposing Initiated Act No. 2, urged the defeat of prohibition and listed several reasons why Act No. 2 should be defeated. It urged that legal sales would be replaced with illegal sales; that the state, counties and municipalities would lose more than five and a half million dollars in annual direct tax revenue; that prohibition would destroy full time jobs of more than 12,000 breadwinners and would strike at an industry which purchases over two million dollars worth of rice and other products; that prohibition on the state-wide level would not work, but would merely breed crime and lawlessness; that the present law was strong and workable. (This Exhibit is reproduced in full and attached).

8. Application to the Commissioner of Internal Revenue was made by the Arkansas Legal Control Associates, Inc., for exemption under section 101(7) of the Internal Revenue Code of 1939 on May 25, 1951.

[fol. 11b] 9. A copy of a letter dated October 11, 1951 from the Deputy Commissioner denying the application of the Arkansas Legal Control Associates, Inc., was attached as Joint Exhibit 12-L. This letter directed to the Arkansas Legal Control Associates, Inc. provided in part:

"It is stated in the exemption affidavit submitted that you were organized to promote the interests of persons engaged in the alcohol beverage industry in Ark., and to create a favorable public opinion for the alcohol beverage industry in Ark. in an effort to counteract the attacks of the prohibitionists; that this was to be done by educating the public as to the evils of prohibition and the benefits of regulatory laws through the use of the radio, advertisements in newspapers, dissemination of literature and other lawful means; and that you will support or oppose public laws or constitutional measures which your members deem against public interest and the purposes and objects of your corporation.

It is further stated in the information submitted that your latest activity was the defeat of Initiated Act No. 2 at the November 7, 1950 general election; that this act was designed to prevent the sale of alcoholic beverages in Arkansas; and that your organization is presently inactive. . .

Inasmuch as the evidence on file in this office shows that your sole function and activity consisted of engaging in activities designed to influence legislation, through the use of the radio, advertisements in newspapers and dissemination of literature, it is the opinion of this office that you are not entitled to exemption from Federal income tax as a business league under the provisions of section 101(7) of the Code, and that you are not an organization of the same general class as a chamber of commerce or board of trade within the meaning of Income Tax Regulations III, section 29.101 (7)-1. You will accordingly be required to file Federal income tax returns on Form 1120.

Contributions made to you are not deductible by the donors in computing their taxable net income in the manner and to the extent provided by section 23 (o) and (q) of the Code."

10. "The issue raised by paragraph 4(b) of the petition

[fol. 11i] involving the surtax under section 102 of the Internal Revenue Code of 1939, has been settled by mutual agreement, and as a result of that agreement, if the petitioner prevails in respect to the issue raised in paragraph 4(a) of the petition, the court should determine a deficiency in the amount of \$6,500.00 for 1950, and if the respondent prevails in respect to the issue raised in paragraph 4(a) of the petition, the court should determine a deficiency in the amount of \$10,386.12 for 1950."

Exhibit 5-E.

RUSSELL BROWN & COMPANY

(P. 19)
Exhibit "B"

Arkansas Legal Control Associates, Inc.

Statement of Income and Expenses

For the Period Beginning May 3, 1950 and Ending November 30, 1950

Income Received

Contributions Received - Schedule "2"
Interest Received

126,265.81
7.84

Total Revenue Received

126,273.65

Expenses

Brooks-Pollard Company - Advertising - Schedule "3"
Salaries - Schedule "4"
Attorney's Fees
Donation
Freight
Office Supplies
Other Miscellaneous Expenses
Postage
Printing
Rent - Rooms
Rent on Furniture and Equipment
Telephone
Travel
Taxes - Social Security
- State Unemployment Compensation
Advertising - Other than Through Brooks-Pollard Company

100,374.60
9,774.97
1,200.00
3,000.00
58.97
415.40
176.72
5,087.44
852.42
1,073.32
375.73
161.07
722.00
113.82
230.32
225.32

Total Expenses

121,981.50

Excess of Income over Expenses

1,292.15

EX5-E

Note

Pages 20, 22, 24. - blank;
Pages 21, 23, 25 - on Card 6

Testimony.

CHARLES CONE, a witness on behalf of Petitioner, testified.

He was employed by **F. Strauss & Son, Inc.** of Arkansas, and was so employed in 1950 as Secretary-Treasurer and General Manager. **F. Strauss & Son, Inc.** of Arkansas is engaged in the wholesale liquor business, selling liquor to retail package stores. (T-7.)

Witness is completely familiar with the Arkansas Legal Control Associates, Inc. In 1950 **F. Strauss & Son, Inc.** of Arkansas made a contribution of \$9,252.67 to such company. (T-8.)

In 1950 an initiated act was placed on the ballot in the General Election known as the Statewide Prohibition Act. That Act would have put the Petitioner out of business, a business that Petitioner had enjoyed for 15 years under a good law enacted in March of 1935. (T-8.)

[fol. 11j] Nine wholesalers, including **F. Strauss & Son, Inc.** of Arkansas, at that time formed the Arkansas Legal Control Associates, Inc. for the sole purpose, through coordinated effort, of informing the general voting public of all information concerning the Act in an effort to persuade them to vote against it. (T-9.)

These funds were advanced through the Arkansas Legal Control Associates, Inc. because the nine wholesalers felt in unity there was strength, and, secondly, because the exact situation had come up in 1948 in Colorado, and the wholesale liquor dealers set up an organization known as Colorado United, which was given an exemption certificate by the United States Treasury Department. (T-9.)

If statewide prohibition had been acted in Arkansas the company would have suffered an irreparable loss. The contribution of \$9,252.67 was a reasonable amount. (T-10.)

It was further stipulated that Harry Hastings, President of Moon Distributors, Inc., and Barrett Hamilton, President of Barrett Hamilton, Inc., and Mr. Mervin Leibs, General Manager of Little Rock Distributors, Inc., would have testified to the same facts as here testified to by witness Charles Cone. (T-11.)

[fol. 70] (Findings of Fact and Opinion of The Tax Court of the United States.)

28 T. C. No. 65.

Tax Court Of The United States

F. Strauss & Son, Inc. Of Arkansas, Petitioner,
Docket No. 53669. vs.
Commissioner Of Internal Revenue, Respondent.

Filed May 31, 1957.

The petitioner, a wholesale liquor dealer, paid sums of money to a corporation organized by nine Arkansas liquor wholesalers for the purpose of persuading Arkansas voters by various advertising devices to vote against a proposed Arkansas prohibition act.

Held: Such sums are not deductible either as business expenses under section 23(a) (1) (A), Internal Revenue Code of 1939, or as contributions under section 23(q), Internal Revenue Code of 1939.

E. Chas. Eichenbaum, Esq., for the petitioner.

John P. Higgins, Esq., for the respondent.

[fo]. 71] **Bruce, Judge** The respondent determined a deficiency in the income tax of petitioner for the calendar year 1950 in the amount of \$20,990.36. Of the adjustments made by respondent the only one remaining in dispute is whether payment of \$9,252.67 by petitioner to the Arkansas Legal Control Associates, Inc., in 1950 constituted an ordinary and necessary business expense of petitioner or, alternatively, whether such payment is deductible as a contribution within the meaning of section 23(q), Internal Revenue Code of 1939.

Findings Of Fact.

The stipulated facts, together with attached exhibits, are incorporated herein by this reference. Petitioner is a corporation organized under the laws of the State of Arkansas with its principal place of business in Little Rock, Arkansas. Petitioner kept its books and prepared its income and excess profits tax returns on an accrual basis of accounting. Its 1950 income and excess profits tax return was filed with the collector of internal revenue for the district of Arkansas. In the year 1950 petitioner was engaged in the whole-sale liquor business.

Subject to provisions for countywide local option (secs. 48-801 and 48-807, Ark. Stat. Ann. of 1947), the sale of intoxicating liquor in Arkansas has been legal since 1935.

An initiative petition calling for an election on a state-wide prohibition act was circulated in Arkansas, filed with the Office of the Secretary of State, placed on the ballot, and voted on in the general election held in Arkansas on November 7, 1950. The general purpose of the act was to make it unlawful to manufacture, sell, barter, loan, or give away intoxicating liquors within the State of Arkansas or to export from, import to or transport the same within the State of Arkansas.

[fol. 72] In May of 1950 nine liquor wholesalers petitioned the Circuit Court of Pulaski County, State of Arkansas, to declare Arkansas Legal Control Associates, Inc. (hereinafter referred to as Control Associates) duly incorporated as a nonprofit corporation pursuant to the provisions of the state law. The Circuit Court of Pulaski County issued a certificate of incorporation to Control Associates on May 3, 1950. The stated objects and purposes of Control Associates provided, inter alia:

Article II.

Objects And Purposes.

Section 1.

The objects and purposes for which this organization is formed and the powers and rights which it shall exercise

and enjoy are: To foster and promote in every and any lawful manner the interests of persons, firms, associations, corporations and others engaged or interested directly or indirectly in the alcohol beverage industry, or in any branch thereof, or in any industry or business alike or incidental thereto.

Section 2.

In furtherance, but not in limitation, of the foregoing general purposes, it is expressly provided that the organization shall have the following powers:

• • • • •
b. To engage in educational and publicity campaigns and programs.

c. To support improved regulatory laws governing the sale and use of alcohol beverage, and to uphold the system of private enterprise in the manufacture, distribution and sale of alcohol beverage.

d. To provide honest opposition to the principles of prohibition, and its resulting evils.

e. To support related public relations programs.
• • • • •

[fol. 73]

Article V.

Uses.

The corporation shall not be used for business purposes or make any contribution or expenditure in connection with any election at which Presidential or Vice Presidential electors or a Senator or Representative to Congress are to be voted for or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for the pecuniary gain or profit of its members, and no part of the net earnings of the corporation shall inure to the benefit of any member or private individual. The corporation may, however, support or oppose public laws or constitutional measures which its

members and trustees deem against public interest and opposed to the purposes and objects of the corporation.

.

The purpose of the wholesalers in forming Control Associates was to provide means of coordination of their efforts in persuading the general public to vote against the proposed statewide prohibition act.

An application for exemption under section 101(7) of the Internal Revenue Code of 1939 was filed with the Commissioner of Internal Revenue on May 25, 1951, by Control Associates. This application for exemption was rejected by the Commissioner on October 11, 1951. The letter of rejection provided in part as follows:

.

Inasmuch as the evidence on file in this office shows that your sole function and activity consisted of engaging in activities designed to influence legislation, through the use of the radio, advertisements in newspapers and dissemination of literature, it is the opinion of this office that you are not entitled to exemption from Federal income tax as a business league under the provisions of section 101(7) of the Code, and that you are not an organization of the same general class as a chamber of commerce or board of trade within the meaning of Income Tax Regulations III, section 29.101(7)-1. You will accordingly be required to file Federal income tax returns on Form 1120.

[fol. 74] Contributions made to you are not deductible by the donors in computing their taxable net income in the manner and to the extent provided by section 23(o) and (q) of the Code.

.

After the organization of Control Associates in 1950 petitioner paid the amount of \$9,252.67 to that organization. Contributions totaling \$126,265.84 were received by Control Associates for the period beginning May 30, 1950 and ending November 30, 1950. During that period over \$100,000

was paid out by Control Associates for direct advertising through newspapers, radio, billboards, distribution of book matches, bar banners, special folders, and press releases. Such advertising contained reasons and statistics designed to convince the voters that it was to the public interest to defeat the act. The balance of the contributions was paid out for related expenses of supervising and coordinating such advertising. The statewide prohibition act was defeated. On its income tax return for 1950 the petitioner deducted the \$9,252.67 in dispute from gross income as business expense. The respondent disallowed such deduction.

Opinion.

The principal issue in this case is whether amounts paid by petitioner, a wholesale liquor dealer, to a corporation organized by nine Arkansas liquor wholesalers for the purpose of persuading Arkansas voters by various advertising devices to vote against a proposed prohibition act, are deductible as ordinary and necessary business expenses within the meaning of section 23(a)(1)(A), Internal Revenue Code of 1939. It is clear that such payments are not deductible under section 23(q), Internal Revenue Code of 1939, and the petitioner does not seriously contend otherwise.

[fol. 75] The question involved herein has been determined many times by this and other courts. In *Textile Mills Securities Corporation vs. Commissioner*, 314 U. S. 326, the Supreme Court determined that certain amounts expended to provide publicity and promote propaganda seeking to influence proposed legislation were not deductible as "ordinary and necessary" business expenses within the meaning of section 23(a) of the Revenue Act of 1928, the language of which is identical with the applicable language of section 23(a)(1)(A) of the Internal Revenue Code of 1939.

We have recently had occasion to determine the principles involved in the instant case in *Herbert Davis*, 26 T. C. 49. There the petitioner was one of three licensed liquor dealers in Clinton, Tennessee, all of whom were restricted to operating within a three-block area located approximately in the center of the Clinton business district. Petitioner made certain payments in 1950 for dues to an asso-

ciation of liquor dealers, the funds of which association were used in the main for propaganda purposes and for campaign expenses in conjunction with a 1950 liquor referendum, to influence voters to vote "wet." In that case we followed the rule of Textile Mills and held that the payments were not deductible as ordinary and necessary business expenses:

The law is well settled. In *Textile Mills Securities Corporation vs. Commissioner*, 314 U. S. 326 (1941), the Supreme Court, in a case involving donations made by a corporation, gave its approval to the substance of the regulations here involved when it sanctioned the then applicable provision of Regulations 74 containing precisely the same language presently included in Regulations 111, sections 29.23(o)-1 and 29.23(q)-1. The application of such principles to limit the deductibility of donations of individuals under section 23(o) by Regulations 111, section 29.23(o)-1, is equally valid. *Textile Mills Securities Corporation*, supra; *Mary E. Bellingrath*, 46 B.T.A. 89 (1942); *Mrs. William P. Kyne*, 35 B.T.A. 202 (1936).

[fol. 76] We have also held that the principles embodied in such regulations were applicable as well under section 23 (a). *McClintock-Trunkey Co.*, 19 T. C. 297, 304 (Issue 2), reversed on another issue (C.A. 9, 1954) 217 F. 2d 329. See also *American Hardware & Equipment Co. v. Commissioner*, (C.A. 4, 1953) 202 F. 2d 126, affirming a Memorandum Opinion of this Court.

See also *Wm. T. Stover Co.*, 27 T.C. 434, and *Revere Racing Association, Inc. vs. Scanlon*, 232 F. 2d 816.

Petitioner recognizes the contrary effect of these cases. It is argued, however, that the rule of the *Textile Mills* case has been substantially narrowed by subsequent decisions of the Supreme Court, citing *Heininger vs. Commissioner*, 320 U. S. 467, and *Lilly vs. Commissioner*, 343 U. S. 90. The *Heininger* case involved the deductibility of lawyers' fees and other legal expenses incurred by the taxpayer in unsuccessfully contesting a Post Office fraud order. *Lilly* involved the deductibility of an optical company's payments to eye doctors, which payments amounted to one-third of the retail price of eyeglasses which were prescribed to patients by such eye doctors. Neither involved the question.

of the deductibility of expenditures used for lobbying purposes and are therefore distinguishable and do not come within the precedent of the Textile Mills case. See Lilly vs. Commissioner, supra, at page 95. Accordingly, we hold that the payments in issue are not deductible by the petitioner as an ordinary and necessary business expense.

Decision will be entered that there is a deficiency in the amount of \$10,386.12.

[fol. 77] (Order of Redetermination, June 4, 1957.)

The Tax Court Of The United States
Washington

F. Strauss & Son, Inc. Of Arkansas, Petitioner,
Docket No. 53669. vs.
Commissioner Of Internal Revenue, Respondent.

Decision.

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed May 31, 1957, it is

Ordered And Decided: That there is a deficiency in income tax for the year 1950 in the amount of \$10,386.12.

Enter: Entered Jun 4, 1957.

Seal
The Tax Court
of the
United States

J. GREGORY BRUCE,
Judge.

[fol. 78] (Petition of F. Strauss & Son, Inc. of Arkansas for Review of Decision of The Tax Court of the United States.)

(Received and Filed Aug. 2, 1957, The Tax Court of the United States.)

The Tax Court Of The United States

F. Strauss & Son, Inc. Of Arkansas, Petitioner,
Docket No. 53669. vs.
Commissioner Of Internal Revenue, Respondent.

To The Honorable The Judges Of The United States Court
Of Appeals For The Eighth Circuit:

Comes the Petitioner, by its counsel, and prays a review of the decision of The Tax Court of the United States entered June 4, 1957 in the above captioned action.

As grounds for this proceeding, Petitioner states:

I. F. Strauss & Son, Inc. of Arkansas, Petitioner for review, is a corporation organized under the laws of the State of Arkansas with its principal place of business in the City of Little Rock, Arkansas, and was during all times material herein.

II. The controversy involves a proceeding for redetermination of a deficiency in Petitioner's 1954 Federal Income Tax in the amount of \$20,990.36. The controversy arises out of a disallowance by the Commissioner of Internal Revenue of a deduction based on a contribution by Petitioner in the amount of \$9,252.67 to the Arkansas Legal Control Associates, Inc. for the taxable year 1954. Originally there was an additional issue involved as to whether Petitioner was liable for the surtax imposed by Section 102 of the Internal Revenue Code of 1939. The Section 102 issue was settled by stipulation that if the Petitioner should prevail in respect to the issue still in [controversy], the Court should determine a deficiency of \$6,500.00, and if the Respondent should prevail the Court should determine a deficiency of \$10,386.12.

III. Pursuant to the determination of The Tax Court of the United States, as set forth in its Opinion promulgated May 31, 1957, a decision was entered on June 4, 1957, adjudging a deficiency in income tax in the amount of \$10,386.12 for the year 1950.

IV. Petitioner, on appeal, intends to rely upon the following points:

(1) The Court erred in determining that the amounts paid in 1950 by Petitioner to Arkansas Legal Control Associates, Inc. were not deductible as ordinary and necessary business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

(2) The Court erred in impliedly ruling that the payments by Petitioner in 1950 to Arkansas Legal Control As-

sociates, Inc., although ordinary and necessary, and other [fol. 80] wise deductible, should be disallowed as an expense because of public policy.

(3) The Court erred in disallowing the amounts paid Arkansas Legal Control Associates, Inc. as a deduction from gross income.

Wherefore, Petitioner prays that the Court review the decision and grant the relief prayed in the original pleadings below.

E. CHAS. EICHENBAUM
LEONARD L. SCOTT
W. S. MILLER, JR.

[fol. 83] (Clerk's Certificate to Transcript.)

Tax Court of the United States
Washington

F. Strauss & Son, Inc. of Arkansas, Petitioner,
Docket No. 53669. vs.
Commissioner of Internal Revenue, Respondent.

Certificate.

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing pages 1 to 82, inclusive, as called for by the designation filed in this case, are true copies of the original documents of record on file in my office, and of the docket entries as they appear in the official docket of my office, in the case docketed at the above number, in which the petitioner, in this Court has filed a petition for review.

Seal
The Tax Court of
the United States

In testimony whereof, I hereunto set
my hand and affix the seal of the
Tax Court of the United States,
at Washington, in the District of
Columbia, this 30th day of Au-
gust, 1957.

HOWARD P. LOCKE,
Clerk of the Court.

Filed Aug. 28, 1957, E. E. Koch, Clerk.

[fol. 86] (Additional Docket Entries)

F. Strauss & Son, Inc. of Arkansas, Petitioner,
Docket No. 53669. vs.
Commissioner of Internal Revenue, Respondent.

1957

Aug. 21—Transcript of record sur petition for review sent Clerk, U. S. Ct. of Appeals 8th Cir.

Aug. 26—Amendment to Petition for Review and Amendment to Designation, with certificate of service thereon, filed.

[fol. 87] Amendment to Petition of F. Strauss & Son, Inc. of Arkansas for Review of Decision of The Tax Court of the United States.)

(Received and Filed Aug. 26, 1957, The Tax Court of the United States.)

The Tax Court of The United States

F. Strauss & Sons, Inc. of Arkansas, Petitioner,
Docket No. 53669. vs.
Commissioner of Internal Revenue, Respondent.

Amendment to Petition for Review:

To the Honorable the Judges of the United States Court of Appeals for the Eighth Circuit:

Comes the Petitioner, by its counsel, and amends its Petition for review as follows only:

The first two sentences in paragraph No. II reading:

"The controversy involves a proceeding for redetermination of a deficiency in Petitioner's 1954 Federal Income

Tax in the amount of \$20,990.36. The controversy arises out of a disallowance by the Commissioner of Internal Revenue of a deduction based on a contribution by Petitioner in the amount of \$9,252.67 to the Arkansas Legal Control Associates, Inc. for the taxable year 1954", should read:

"The controversy involves a proceeding for redetermination of a deficiency in Petitioner's 1950 Federal Income Tax [fol. 85] in the amount of \$20,990.36. The controversy arises out of a disallowance by the Commissioner of Internal Revenue of a deduction based on a contribution by Petitioner in the amount of \$9,252.67 to the Arkansas Legal Control Associates, Inc. for the taxable year 1950."

Wherefore, Petitioner prays that the Court review the decision as prayed in its original Petition.

E. CAS. EICHENBAUM,

LEONARD L. SCOTT,

W. S. MILLER, JR.,

12th Floor, Boyle Building,
Little Rock, Arkansas,
Attorneys for Petitioner.

[fol. 91] (Clerk's Certificate to Supplemental Record.)

Tax Court of the United States
Washington

F. Strauss & Sons, Inc. of Arkansas, Petitioner,
Docket No: 53669. vs.
Commissioner of Internal Revenue, Respondent.

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing pages, 83 to 87, inclusive, are true copies of the original "Amendment to Petition for Review", "Amendment to Designation of Contents of Record on Appeal" and "Certification" of service, which originals were filed in my office in the above entitled case on August 26, 1957, after the

record on review had been forwarded to the Clerk of the appellate court, and which copies, together with the supplemental docket entries, as they appear in the official docket in my office, constitute a supplemental record on this review.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of August, 1957.

Seal
The Tax Court of
the United States

RALPH A. STARNES,
Chief Deputy Clerk of the Court.

Filed Aug. 28, 1957, E. E. Koch, Clerk.

[fol. 38]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,864

F. STRAUSS & SON, INC. OF ARKANSAS, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Petition to Review Decision of The Tax Court
of the United States.

Leonard L. Scott and E. Charles Eichenbaum (W. S. Miller, Jr., was with them on the brief) for Petitioner.

David O. Walter, Attorney, Department of Justice (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, Attorney, Department of Justice, and Grant W. Wiprud, Attorney, Department of Justice, were with him on the brief) for Respondent.

Before Gardner, Chief Judge, and Woodrough and Vogel,
Circuit Judges.

OPINION—January 24, 1958

GARDNER, Chief Judge

This matter is before us on petition to review a decision of the Tax Court which determined a deficiency in petitioner's income tax for the year 1950 in the amount of \$10,386.12.

[fol. 39] Taxpayer is a corporation which at all times here pertinent was engaged in the wholesale liquor business in Little Rock, Arkansas. The sale of liquor in Arkansas has

been legal since 1935, subject to state laws providing for county-wide option. At a general election held in November, 1950, there was submitted to vote, pursuant to the Arkansas law, an initiated measure in the nature of a state-wide prohibition act which by its terms would have made it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to or transport the same within the state.

In this situation taxpayer and eight other wholesale liquor dealers organized a corporation known in the record as the Arkansas Legal Control Associates, Inc., which we shall hereinafter refer to as the corporation. The purpose of the wholesalers in forming the corporation was to persuade the electorate to vote against the proposed prohibition act, and for the period from May 30 to November 30, 1950, the corporation received contributions totaling \$126,265.84 and disbursed over \$100,000 for direct advertising through newspapers, radio, billboards, book matches, bar banners, special folders and press releases. Such advertising contained arguments designed to convince the voters that it was in the public interest to defeat the proposed prohibition act. Taxpayer's contribution to the corporation amounted to \$9,252.67. On its income tax return for 1950 taxpayer deducted this amount from gross income as an ordinary and necessary business expense but the Commissioner disallowed this deduction.

In the Tax Court taxpayer contended that its payment to the corporation was deductible as a business expense, or alternatively, as a contribution. The Tax Court determined that the payment made by taxpayer to the corporation was neither deductible as a contribution under Section 23(q) of the Internal Revenue Code of 1939 nor as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939. Taxpayer has now abandoned its contention that this payment to the corporation was a contribution deductible under Section 23(q) of the Internal Revenue Code of 1939, but adheres to its contention that its payment to the corporation was an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939, and that is the sole question presented for our determination.

Section 23(a)(1)(A) reads in part as follows:

"In computing net income there shall be allowed as deductions: * * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *"

The statute does not define nor determine what is or is not an "ordinary and necessary" business expense. Deductions are a matter of legislative grace and do not turn on general equitable considerations and the burden of clearly showing the right to the claimed deduction is on the taxpayer. *Deputy v. DuPont*, 308 U.S. 488; *New Colonial Co. v. Helvering*, 292 U.S. 435; *Omaha Nat. Bank v. Commissioner of Internal Rev.*, 8 Cir., 183 F.2d 899; *O'Malley v. Yost*, 8 Cir., 186 F.2d 603; *Wetterau Grocer Co. v. Commissioner of Internal Rev.*, 8 Cir., 179 F.2d 158; *Montana Power Company v. United States*, 3 Cir., 232 F.2d 541. In *New Colonial Co. v. Helvering*, supra, the rule is stated as follows:

"Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

[fol. 41] In *Omaha Nat. Bank v. Commissioner of Internal Rev.*, supra, in referring to the rule to be followed in determining income tax deductions we said:

"In examining the taxpayer's argument we are required to be mindful of the rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer."

The statute allowing deductions for ordinary and necessary business expenses, as has been observed, does not define nor determine what is or is not an ordinary and necessary business expense. In this situation Section 29.23(q)-1, Treasury Regulation 111, was adopted definitely describing certain classes of expenditures as not allowable deductions under this statute. The regulation reads as follows:

“ * * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.”

This regulation has been in effect for nearly forty years and is in the nature of a proclaimed policy. It was considered and sustained by the Supreme Court in *Textile Mills Corp. v. Comm'r.*, 314 U.S. 326. In that case the court disallowed as deductions expenditures for services rendered in an attempt to procure legislation authorizing payment of claims submitted by former enemy aliens. In the course of the opinion the court among other things said:

“The words ‘ordinary and necessary’ are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch v. [fol. 42] Helvering*, 290 U.S. 111; *Deputy v. duPont*, 308 U.S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist v. Child*, 21 Wall. 441; *Hazeltine v. Sheckells*, 202 U.S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from ‘ordinary and necessary’ expenses certainly does no violence to the statutory language. The general

policy being clear it is not for us to say that the line was too strictly drawn."

See also *McDonald v. Commissioner*, 323 U.S. 57; *Roberts Dairy Co. v. Commissioner of Internal Rev.*, 8 Cir., 195 F.2d 948; *Sunset Scavenger Co. v. Commissioner of Internal Rev.*, 9 Cir., 84 F.2d 453; *Cammarano v. United States*, 9 Cir., 246 F.2d 751; *Revere Racing Association v. Scanlon*, 1 Cir., 232 F.2d 816; *American Hardware & Eq. Co. v. Commissioner of Internal Rev.*, 4 Cir., 202 F.2d 126.

Taxpayer is a corporation organized for the purpose of conducting a wholesale liquor business. It cannot, we think, be reasonably contended that expenditure in conducting a campaign for the defeat of a proposed prohibition enactment was an ordinary and necessary expense of "carrying on" a wholesale liquor business. The corporation [fol. 43] was empowered by its charter to conduct a wholesale liquor business and it was not empowered by its charter or articles of incorporation to conduct political campaigns. In *McDonald v. Commissioner*, supra, petitioner made very substantial expenditures in his campaign to be re-elected a judge and he sought to deduct these expenditures as ordinary and necessary business expenses. In denying the right to make these deductions, the court among other things said:

"He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years."

In that case, as in the instant case, it was urged that the expenditure was necessary as his defeat in the election would ruin his business. Quite aside from the Treasury Regulation, we think it cannot be said that this statute, Section 23(a)(1)(A) of the Internal Revenue Code of 1939, is a clear provision for such allowance.

It is urged by taxpayer that the quoted regulation, if applicable, is invalid, and in this connection it is contended that as there has been no real re-enactment of the Internal Revenue Code since this regulation was approved by the Supreme Court in the *Textile Mills* case, supra, the

question of its validity is still an open one and, hence, it is not entitled to the support of the principle that repeated Congressional re-enactment of the statutory provision to which a regulation pertains gives it the force and effect of law. The decision in the *Textile Mills* case was presumably well known to the Congress. The Congress has had many sessions since this decision was handed down and the regulation itself has been in effect for nearly forty years, and presumably that fact was also well known to [fol. 44] the Congress. Nevertheless, the Congress has passed no act rejecting the construction given this statute by this regulation. *United States v. Armature Rewinding Co.*, 8 Cir., 124 F.2d 589; 47 C. J. S. Internal Revenue, Section 70, p. 201. In *United States v. Armature Rewinding Co.*, supra, in referring to the fact that the Congress had passed no act rejecting the construction adopted by the Commissioner of Internal Revenue, we said:

"It has, however, become increasingly apparent that the purpose of a taxing act, the probable intent of Congress, the general statutory scheme of taxation set up, and the construction adopted by the Commissioner of Internal Revenue and not rejected by Congress must all be given appropriate effect in determining what meaning is to be accorded a word or a phrase in such an act."

The applicable rule is succinctly stated in 47 C. J. S. Internal Revenue, supra, as follows:

"A treasury department regulation construing and interpreting an internal revenue statute is deemed approved by congress where congress thereafter substantially reenacts the statute. *A similar inference of congressional approval of the regulation is made where a substantial period of time has elapsed since the promulgation of the regulation and congress has not acted with respect to the statute . . .*" (Italics supplied.)

Manifestly, under this regulation the deductions here claimed did not constitute ordinary and necessary business expenses.

Taxpayer contends that the doctrine of the *Textile Mills* case has been modified by the decisions of the Supreme Court in *Commissioner v. Heininger*, 320 U.S. 467, and *Lilly v. Commissioner*, 343 U.S. 90. The argument is [fol. 45] plausible but not convincing. The *Textile Mills* case sustained without qualification the regulatory provision in question as valid. In *Commissioner v. Heininger* and *Lilly v. Commissioner*, both supra, the decisions were not based upon the Treasury Regulations but the question was whether certain expenditures were non-deductible because contrary to public policy. The court held they were not contrary to public policy and, hence, deductible. We think these decisions detracted nothing from the teaching of the decision in the *Textile Mills* case.

We have considered all the other contentions urged by taxpayer but think them without merit. The decision of the Tax Court is therefore affirmed.

[fol. 46]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15864—September Term, 1957.

F. STRAUSS & SON, INC. OF ARKANSAS, Petitioner,

v.

Commissioner of Internal Revenue.

Petition to Review Decision of The Tax Court
of the United States.

JUDGMENT—January 24, 1958

This cause came on to be heard on the petition to review the decision of The Tax Court of the United States entered June 4, 1957, which determined a deficiency in petitioner's

income tax for the year 1950 in the amount of \$10,386.12, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of said The Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the said petition to review in this cause be, and the same is hereby, dismissed.

[fol. 47] Petition for rehearing covering 6 pages filed February 13, 1958, omitted from this print.

It was denied, and nothing more by order, March 3, 1958.

[fol. 53]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15864

[Title omitted]

ORDER DENYING PETITION OF PETITIONER FOR REHEARING—
March 3, 1958.

Petition for rehearing filed by the petitioner in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

March 3, 1958.

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 928, October Term, 1957

F. STRAUSS & SON, INC. OF ARKANSAS, Petitioner,

v.

Commissioner of Internal Revenue.

ORDER ALLOWING CERTIORARI—May 26, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 718.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

BIGOTRY

***Meaning: if I don't like it
YOU can't have it**

Are you, too, fed up with the number of people who try to tell us what we can—and can't—do?

Take Initiative 13, for instance. It would make it against the law to sell a glass of beer or wine in a restaurant or tavern, or a bottle of beer in a grocery store.

The Prohibitionists who put Initiative 13 on the ballot for a vote think it's a good idea—so they try to make everyone else do as they believe!

One of the cherished American ideas is that each of us should respect the rights of others, and be tolerant of each other's ideas. Thirteen years of Prohibition were enough of telling people by law what they could and couldn't do. It failed.

Besides restricting the rights of others, Initiative 13, by forbidding the sale of beer and wine in taverns, grocery stores and restaurants, means the return of the speakeasy and a drastic step toward Prohibition.

**"Big-ot-ry—obstinate and unreasoning attachment to one's own belief and opinions, with intolerance of beliefs opposed to them."*

— Webster

Vote ☒ AGAINST Initiative 13

AT THE NOVEMBER 2 GENERAL ELECTION

Men & Women Against Prohibition

ELEY P. DENSON, *Chairman* • HARRIE BOHLKE, *Executive Secretary*

1218 New Washington Hotel, Seattle

Executive Committee:

Emmett T. Anderson, <i>Tacoma</i>	Cassius E. Gates, <i>Seattle</i>	Roy Lowe, <i>Spokane</i>	Rex J. Raymond, <i>Spokane</i>
Dave Beck, <i>Seattle</i>	James Glenn, <i>Port Angeles</i>	Blanton Luther, <i>Bellingham</i>	Mrs. Alfred R. Rochester, <i>Seattle</i>
Mrs. John S. Brinkley, <i>Seattle</i>	George C. Grandy, <i>Vancouver</i>	Ernest Mallory, <i>Olympia</i>	A. J. "Ab" Ruhl, <i>Spokane</i>
Stephen F. Chadwick, <i>Seattle</i>	Joshua Green, <i>Seattle</i>	C. V. McCoy, <i>Yakima</i>	E. L. Skeel, <i>Seattle</i>
George E. Clark, <i>Yakima</i>	William Curr, <i>Raymond</i>	H. S. McIlvaigh, <i>Tacoma</i>	Stanley Spence, <i>Longview</i>
Clarence Coleman, <i>Everett</i>	Mrs. John H. Hauberg Jr., <i>Seattle</i>	Mrs. Harry J. O'Donnell, <i>Seattle</i>	Herbert West, <i>Walla Walla</i>
L. B. Donley, <i>Aberdeen</i>	Joseph L. Hughes, <i>Wenatchee</i>	Dr. John H. O'Shea, <i>Spokane</i>	William West, <i>Chehalis</i>
Joseph Drumheller, <i>Spokane</i>	Clark Johnson, <i>Garfield</i>	Ida Peterson, <i>Bellingham</i>	E. M. "Ed" Weston, <i>Seattle</i>
Perry E. Dye, <i>Seattle</i>	E. S. Johnston, <i>Pasco</i>	John T. Raftis, <i>Colville</i>	A. R. Whitman, <i>Tacoma</i>
Mrs. Charles C. Finucane, <i>Spokane</i>	L. "Hum" Kean, <i>Bremerton</i>	Charles C. Ralls, <i>Seattle</i>	Mrs. Joseph Wohleb, <i>Olympia</i>

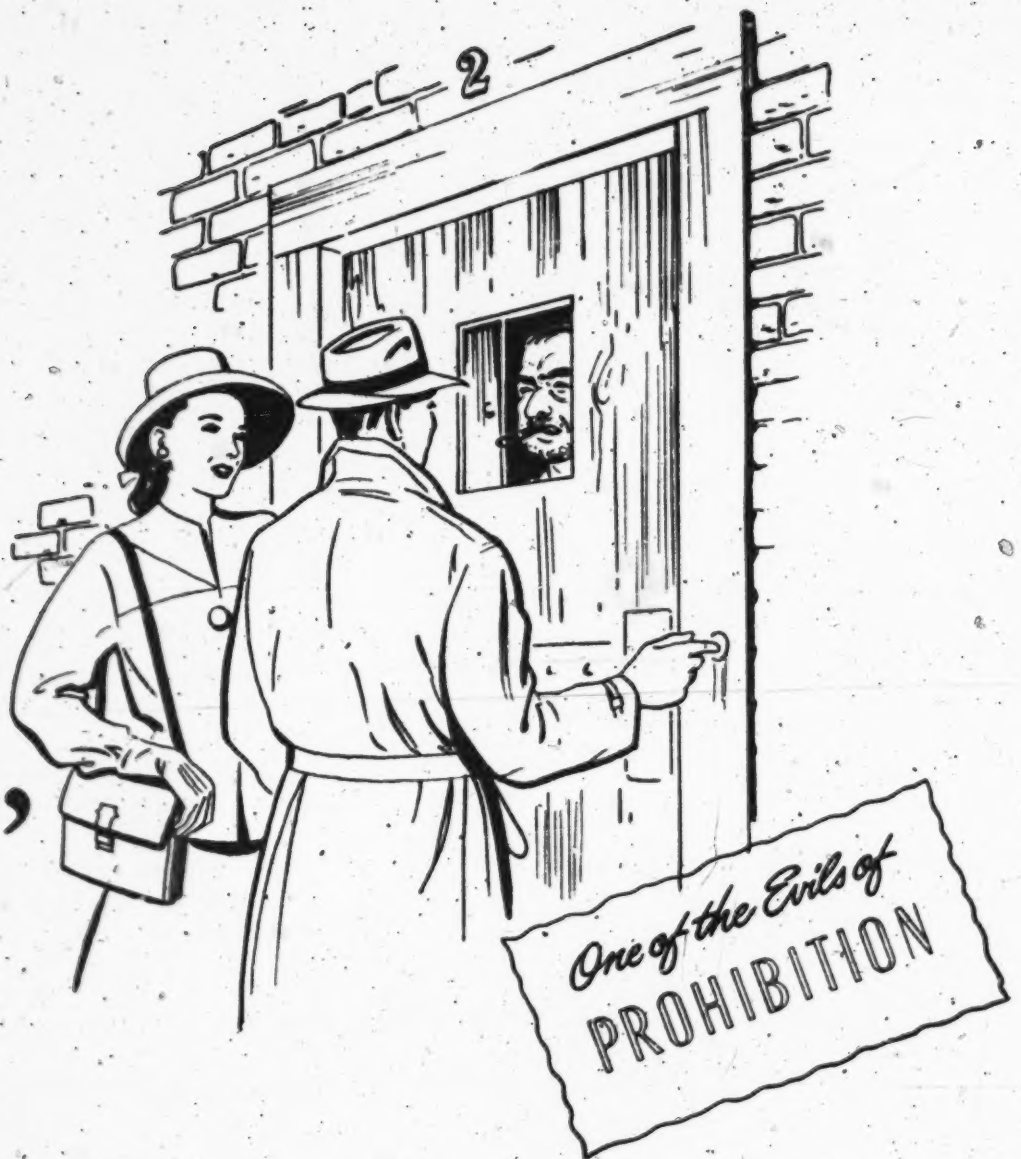
D-1

George B. Adams, Jr.	E. W. Conroy	Ralph E. Goodrich	Louis Kessler	Dr. L. E. Mellor	Alfred Rochester	Frank West	Frank R. Rhodes
Harry J. Ames	C. P. Constantine	Jack Gordon	H. D. Kimsey	Charles J. Mentrin	Peter Rosais	Mrs. A. Weston	Frank E. Rowan
M. O. Anderson	Evan "Doc" Corns	Harry T. Gowman	Dr. Brian T. King	Robert G. Moch	James Schlosstein	Arthur A. Weston	George H. Thomas
H. D. Baker	Mrs. Janice Crowson	Carroll F. Graham	Earle W. Knight	C. Marc Miller	W. W. Scruby	F. J. Wettrick	H. H. Andrews, M.D.
Mrs. Evva Baldwin	B. E. Davidson	Harold E. Gray	Dr. R. P. Kacwilton	Mrs. John L. Moore	Harold Sellin	Herbert Witherspoon	O. E. Anderson
Harry P. Banks	Kathryn G. Donaldson	Tileston Grinstead	Richard C. Kruck	K. A. Moores	Lillian Lucile Senff	Walter W. Zemeck	Douglas Benson
Wanson S. Barr	Dr. Roy Donaldson	Addis Gutmann	George LaFray	Allen B. Morgan	H. F. Simon	Robert J. Acheson	H. Bentley
R. W. Barron	Willis A. Door	O. W. Hardesty	Clarence J. LaMare	P. J. Morrissey	Charles L. Smith	Herbert DeBoer	Mrs. Dorothy L. Brown
Tom Barrow	Don Douglas	Cliff Harrison	Ethel Lamp	Mrs. Mae Neep	Warren G. Smith	F. J. Dubois	W. A. Chamness
Teresa F. Belanger	Donald Earl Dorfner	Web R. Harrison	Les I. Langabeer	A. T. G. (Al) Novak	Rudy Spring	Thos. M. Thomsen	Anna M. Dalgity
Dr. J. C. Bennett	Axel Druggie	James D. Headley	Jay S. Larson	John J. O'Brien	Paul S. Starr	H. L. Underwood	A. Y. Drain
Ed. J. Beslow	Victor E. Elfendahl	Elsie F. Heimgartner	Frank Lazier	Don H. Palmer (Dr.)	C. F. Stenson	Robert H. McCaw	Roy M. Escott
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Harry S. Bowen	Jack Esary, Jr.	Wendell Hemphill	Emmett G. Lenihan	Harry S. Pearson	Sam Stone	Frank Casagno	C. B. Halverson
L. D. Bracken	Frank Estabrook	Joseph F. Hiddleston	Colletta Lindsey	Harry Perkins	Byron J. Stubbs	M. W. Morril	Mrs. Sylvia Hewitt
Col. W. B. Brinton	Ray Fairbanks	W. E. Pinton	Arthur G. Lomax	W. B. Perkins	George R. Stuntz	Worth Stoneburner	Lowell D. King
Ruth E. Brooks	N. W. Federspiel	Donald C. Holcomb	Juan Lopez	O. W. Peterson	John J. Sullivan	A. W. Akers, Jr.	Wm. E. Lindquist
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Dudley Brown	George E. Flood	Robert L. Hosey	A. L. Martin (Dr.)	Eloise Pratt	E. Reeve Talbot	W. R. "Bill" Barry	L. C. Morgan
C. J. Buckham	George Frechette	Deryl T. Hulung	Charles Maryatt	Lois A. Prochnow	Stuart Thompson, Sr.	George Beanblossom	L. R. Paulson
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George Cavano	Mildred Gardner	Paul Isaacson	G. E. McElvain	Harry L. Reed	D. C. Vaile	Ray Dexter	
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Dist. 1-A

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

"Who Sent You?"



THE law-breaking speakeasy that bred crime during Prohibition threatens to come back. Initiative 13, on the ballot in the November election, would close every tavern in the state. *The alternative to the present legal, regulated tavern is the illegal dive.* They will spring up all over the state, if Initiative 13 passes. With them will come the bootlegger to supply them—and the gangster, who will control them. No citizen wants these Prohibition evils back. Work, talk, and vote against Initiative 13.

Initiative 13- First Drastic Step Toward Prohibition

Vote ☒ AGAINST

Men & Women Against Prohibition

ELEY P. DENSON, *Chairman*

HARRIE BOHLKE, *Executive Secretary*

1218 NEW WASHINGTON HOTEL • SEATTLE

EXECUTIVE COMMITTEE

Emmett T. Anderson.....Tacoma	Cassius E. Gates.....Seattle	Roy Lowe.....Spokane	Rex J. Raymond.....Spokane
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		Col. Fred M. Fuecker	Cecil H. McKinstry		George M. Varnell	Ed. Iddings	Dist. 1-A

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

The Prohibitionists Attack Your Corner Grocer!

The Prohibitionists, promoters of Initiative 13, would have you believe it is aimed entirely at the tavern... **THAT IS FAR FROM THE TRUTH!**

Actually, it also affects the retail grocers. Initiative 13, if passed, would PROHIBIT the sale of beer and wine by more than 1,700 retail grocers in the state.

These grocers are substantial citizens of their communities. Their customers are people who enjoy an occasional glass of beer or wine at home, a temperate American custom.

Initiative 13, besides being a drastic step toward state-wide Prohibition, is, we believe, unfair both to the grocery business and to its customers. We urge our friends and fellow citizens to

Vote ☒ AGAINST Initiative 13

Retail Grocers Against Initiative 13

COMMITTEE

H. R. McCullough, *Seattle*
Geo. J. Smith, *Spokane*
W. D. McClelland, *Seattle*
Max A. Anderson, *Seattle*
Irving R. Belden, *Seattle*
Harold R. Nevins, *Seattle*
A. C. Mar, *Seattle*
Lester C. Perkins, *Tacoma*
Wm. L. Bennett, *Tacoma*
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Hans Anderson, *Everett*
J. F. O'Connor, *Everett*
C. A. Matteson, *Everett*
Ben Haggen, *Bellingham*
Neil Wanamaker, *Bellingham*

E. E. Orchard, *Bremerton*
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Carl Reder, *Olympia*
Irving M. Peterson, *Olympia*
Harry S. Hammond, *Aberdeen*
Frank E. Rattie, *Aberdeen*
Chas. H. Swanson, *Hoquiam*
Glen Townsend, *Montesano*
Raymond D. Spurrell, *South Bend*
Wm. G. Singer, *Centralia*

Alfred M. Warmuth, *Chehalis*
N. Rittenhouse, *Vancouver*
W. T. White, *Kelso*
Melvin I. Breathour, *Mt. Vernon*
Hilmer N. Hanson, *Sumas*
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William A. Blagdon, *Port Angeles*
Otto Sorge, *Port Townsend*
A. M. Heindselman, *Spokane*
Fred S. Stejer, *Spokane*
Neal A. Weaver, *Spokane*
James A. Blodgett, *Spokane*
Jasper Wilson, *Spokane*
George Cahoon, *Yakima*
John P. Glesener, *Yakima*

William Sperry, *Wenatchee*
C. G. Armstrong, *Wenatchee*
Maurice W. Wippel, *Ellensburg*
C. G. Baber, *Toppenish*
George A. Schalow, *Okanogan*
Lee Frank, *Tonasket*
W. B. Lane, *Colville*
James Shaw, *Colfax*
A. Reynolds, *Pullman*
William Boewer, *Walla Walla*
Carl D. Frank, *Walla Walla*
Howard F. Beste, *Kennewick*
H. E. Garmo, *Richland*
Harold H. Bux, *Pasco*

D-3

What is Initiative 13?

A brief, factual, question-and-answer explanation of one of the most important measures on your November 2 general election ballot. Study before you vote!

Q. What is Initiative 13?

A. A "dry" or prohibition-type measure, which would prohibit the retail sale of beer and wine by any person except the State of Washington.

Q. Why is Initiative 13 of great public interest?

A. Because it is the first move of the Drys in the State of Washington to bring back state-wide Prohibition.

Q. What would happen if Initiative 13 passed?

A. Every licensed retail outlet selling beer and wine by the glass would close, and the sale of beer and wine would be prohibited by law in every restaurant, grocery store and tavern.

Q. What about the man who only wants to buy a glass of beer, after work or in the evening.

A. He would be out of luck. *There would be no sale of beer by the glass except illegally.* An old, accepted American custom would be forbidden by law; the man who wanted a glass of beer would have to buy it at some illegal dive.

Q. What would be the practical effect of Initiative 13's passage?

A. It would bring back conditions which existed under Prohibition, for it is a drastic restriction on the sale of beer and wine. Because beer and wine would not be freely sold speakeasies would spring up, just as they did during Prohibition—followed by bootleggers, gangsters, crime and graft.

Q. Why do you say that?

A. *Because we proved during Prohibition that when you prohibit the legal tavern, the illegal dive takes its place.*

Q. Who is sponsoring Initiative 13?

A. The Washington Temperance Association, successors to the old Anti-Saloon League, and

official Prohibition organization of this state. They wrote the measure, and are actively promoting it.

Q. Who is opposing Initiative 13?

A. Many substantial and reputable citizens and organizations; among others:

Washington State Sheriffs' Association
Veterans of Foreign Wars
Washington Federation of Labor
Disabled American Veterans
Seattle Central Labor Council
2,200 Members of "Men & Women Against Prohibition" (see below)
American Legion

and thousands more throughout the state. The state Sheriff's Association stated in a resolution:

"Initiative 13 . . . would result in the springing up of speakeasies, bootleggers . . . would generally foster lawlessness and result in increased sales to minors through illegal sources, just as similar restrictive measures did during Prohibition."

Q. The term "Prohibition" has been used several times in relation to Initiative 13 — on what ground?

A. Read the first line of the measure as reproduced below (and remember it is sponsored by the Prohibitionists):

"AN ACT prohibiting the retail sale of beer and wine . . ."

Initiative 13 is a scheme to trick the people into the first long step toward statewide Prohibition. If the Drys win Initiative 13, the resulting crime, gangsterism and corruption will—they hope—discredit the entire present system in Washington and make their final step, complete Prohibition, so much easier.

This Is How Initiative 13 Will Appear on Your Ballot Nov. 2:

Initiative to the Legislature No. 13

"AN ACT, prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

☐ **FOR**



AGAINST

Men and Women Against Prohibition

ELEY P. DENSON, *Chairman* • HARRIE BOHLKE, *Executive Secretary*

1218 New Washington Hotel, Seattle

Executive Committee:

Emmett T. Anderson, *Tacoma*
Dave Beck, *Seattle*
Mrs. John S. Brinkley, *Seattle*
Stephen F. Chadwick, *Seattle*
George E. Clark, *Yakima*
Clarence Coleman, *Everett*
L. B. Donley, *Aberdeen*
Joseph Drumheller, *Spokane*
Perry E. Dye, *Seattle*
Mrs. Charles C. Finucane, *Spokane*
Cassius E. Gates, *Seattle*
James Glenn, *Port Angeles*
George C. Grandy, *Vancouver*

Joshua Green, *Seattle*
William Gurr, *Raymond*
Mrs. John H. Hauberg Jr., *Seattle*
Joseph L. Hughes, *Wenatchee*
Clark Johnson, *Garfield*
E. S. Johnston, *Pasco*
L. "Hum" Kean, *Bremerton*
Roy Lowe, *Spokane*
Blanton Luther, *Bellingham*
Ernest Mallory, *Olympia*
C. V. McCoy, *Yakima*
H. S. McIlvaigh, *Tacoma*
Mrs. Harry J. O'Donnell, *Seattle*
Dr. John H. O'Shea, *Spokane*

Ida Peterson, *Bellingham*
John T. Raftis, *Colville*
Charles C. Ralls, *Seattle*
Rex. J. Raymond, *Spokane*
Mrs. Alfred R. Rochester, *Seattle*
A. J. "Ab" Ruhl, *Spokane*
E. L. Skeel, *Seattle*
Stanley Spence, *Longview*
Herbert West, *Walla Walla*
William West, *Chehalis*
E. M. "Ed" Weston, *Seattle*
A. R. Whitman, *Tacoma*
Mrs. Joseph Wohlleb, *Olympia*

D-4

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

Prepared by
BOZELL & JACOBS, INC.
Smith Tower, Seattle

VOTE
AGAINST
INITIATIVE

13

VOTE
AGAINST
INITIATIVE

13

VOTE
AGAINST
INITIATIVE

13

VOTE
AGAINST
INITIATIVE

13

VOTE

YOU

WILL BE BREAKING THE LAW

WHEN

YOU BUY A GLASS OF BEER OR WINE

IF

INITIATIVE 13 PASSES

Initiative 13 would forbid by law the sale of beer or wine by the glass. Every tavern would be closed, every grocery store and restaurant forbidden to sell beer or wine.

That means that if you or anyone else wanted to buy a friendly glass of beer or wine, the only place you could get it would be at a speakeasy—and you would be breaking the law!

Now isn't that ridiculous? Yes—just as ridiculous as Prohibition—and Initiative 13 is the Drys' first drastic step toward complete Prohibition in the State of Washington! The same crowd who forced Prohibition on us before are trying to do it again,

Union jobs, too, are at stake. 35,000 union men and women are working under union contracts for the beer and wine industries and associated trades. They will lose their jobs—and some will have to go to work for the speakeasies that will spring up, in order to feed and clothe their families or else go on relief.

MAINTAIN WASHINGTON EMPLOYMENT

VOTE

AGAINST INITIATIVE 13

At the November 2 General Election

Organized Labor Against Initiative 13

John Abrams, Tacoma
Harry J. Ames, Seattle
Ray R. Atkinson, Spokane
Jas. Billew, Everett
Berenice M. Barrow, Seattle
Tom Barrows, Seattle
Lew C. Baum, Port Angeles
Winifred L. Baxter, Seattle
Dave Beck, Seattle
Luis A. Blackmore, Mt. Vernon
William Bonallo, Aberdeen
L. A. Borden, Tacoma
A. A. Bradley, Tacoma
Fred Broken, Anacortes
Arthur Brown, Marysville
Ray Campbell, Everett
George Cavano, Seattle
Francis H. Chapin, Sr., Tacoma
L. J. Christian, Seattle
John M. Christenson, Seattle
R. L. Clevenger, Jr., Tacoma
Clara G. Clinton, Seattle
Ed. Coester, Seattle
Robert R. Collins, Seattle
W. B. Cook, Bremerton
Gladys J. Conner, Seattle

George E. Corey, Tacoma
Edith C. Cram, Seattle
Isaac Crumb, Morton
Maurice Crum, Seattle
Charles C. Curran, Tacoma
H. J. Davelaar, Tacoma
Elmer Davis, Ellensburg
Rudolf Davis, Tacoma
Nick Diamond, Seattle
Willis A. Door, Seattle
Auel Druggs, Seattle
B. I. Elliott, Jr., Seattle
Paul Elliott, Seattle
James Estep, Tacoma
Lawrence Hubody, Centralia
Michael Fiore, Seattle
John F. Flanagan, Seattle
Tillman Garrison, Seattle
William Gaynt, Seattle
Theola Gierke, Olympia
Mrs. Inez E. Given, Seattle
Wm. K. Given, Seattle
Paul Gomsrud, Tacoma
Kenneth L. Gordon, Tacoma
Lester J. Green, Tacoma
Lloyd G. Greger, Bellingham
J. M. Grimes, Mt. Vernon

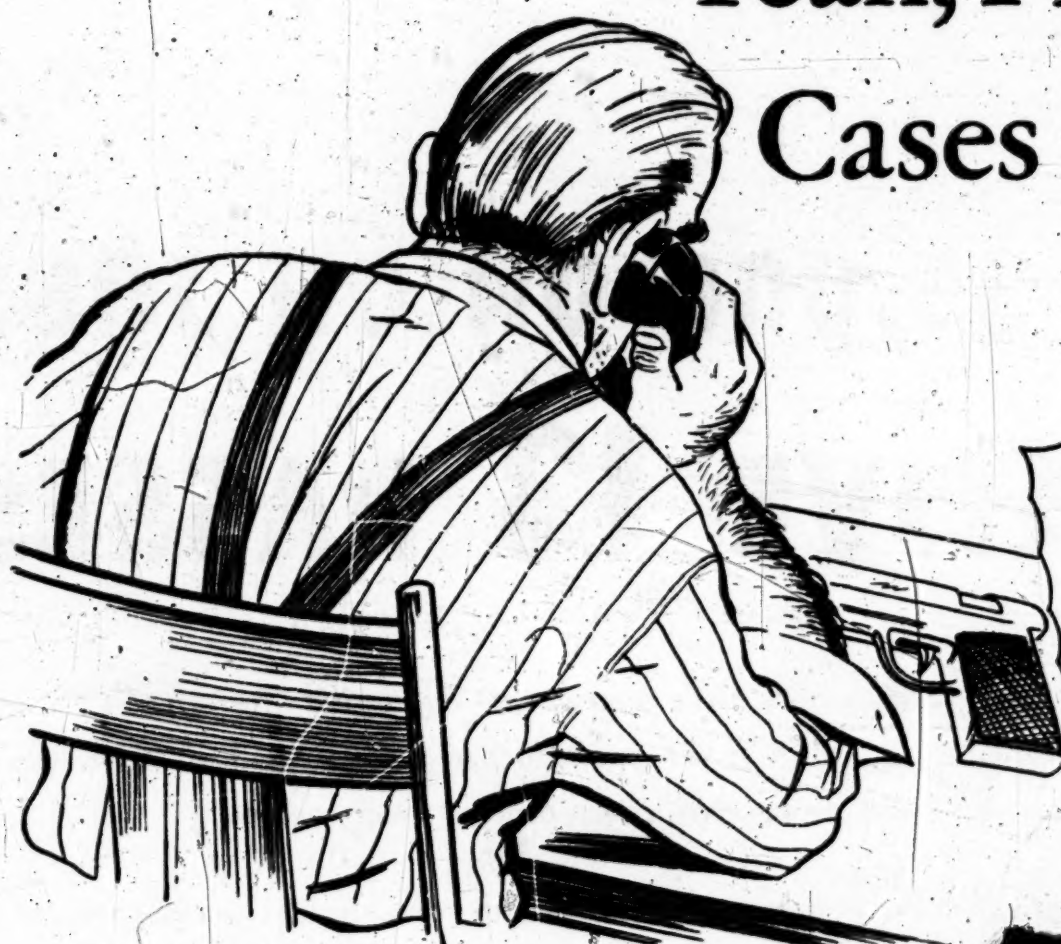
J. M. Hall, Wenatchee
E. R. Harris, Tacoma
Wm. R. Havens, Tacoma
W. H. Hedberg, Tacoma
Wilbur H. Hendershot, Olympia
Arthur J. Hobbs, Mt. Vernon
J. L. Hofmaster, Pasco
E. W. Holbrook, Bremerton
Ted M. Hopkins, Tacoma
John Jacobs, Tacoma
Dick C. Johnson, Mt. Vernon
Frank Kaltsbrun, Seattle
Leo Kocher, Tacoma
John Kramer, Seattle
C. Landers, Everett
Margaret Leishman, Spokane
P. H. LeRiviere, Longview
Albert Leslie, Spokane
Bruce Lewis, Centralia
Nelson A. Lowe, Tacoma
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Walter D. Marvick, Bremerton
Charles J. Mentrin, Seattle
H. D. Merrick, Tacoma
Edythe Mobley, Seattle

Ray Moiso, Tacoma
Paul Mueller, Spokane
Edward J. Murray, Tacoma
C. V. McCoy, Yakima
Doris H. McDonald, Seattle
H. S. McIlvaigh, Tacoma
Margaret McLean, Seattle
R. L. McLean, Seattle
Edw. McNamara, Seattle
Jack Neville, Seattle
C. R. Noble, Tacoma
C. A. North, Tacoma
E. Palmatier, Tacoma
Neil V. Pardo, Seattle
M. T. Pavolka, Tacoma
Neil Pondley, Port Angeles
Ida M. Peterson, Bellingham
O. W. Peterson, Seattle
Eloise Pratt, Seattle
C. W. Rasmussen, Yakima
Steve A. Reay, Tacoma
Harry L. Reed, Seattle
Vernie Reed, Tacoma
Beatrice Rice, Vancouver
Maude Roberts, Longview
C. A. Robertson, Mt. Vernon
A. J. Ruhl, Spokane

John Salie, Spokane
Harry Satterlee, Tacoma
E. A. Schlecter, Longview
George Siegrist, Wenatchee
E. F. Slawson, Walla Walla
A. L. Smith, Olympia
E. W. Smith, Monticello
Mrs. Marcelle R. Smith, Seattle
Margaret Smith, Port Angeles
R. B. "Jack" Smith, Seattle
Susie M. Smith, Olympia
W. J. Smith, Everett
W. R. Smith, Vancouver
Pearl R. Sowers, Raymond
Thad L. Stevens, Walla Walla
M. P. Townsend, Mt. Vernon
Dave S. Turner, Enumclaw
H. E. Walters, Spokane
L. H. Warner, Tacoma
Roy J. Wellfringer, Tacoma
Eudora Wellander, Seattle
John M. Wellander, Seattle
Ed. Weston, Seattle
W. W. Westover, Olympia
Fred Wheeler, Tacoma
Walter E. Williams, Everett

L-4

"Yeah, I'll bring Two Cases After Dark"



One of the Evils of
PROHIBITION

THE bootlegger again has his foot in the door in Washington. Initiative 13 would PROHIBIT the present legal, licensed sale of beer and wine. With every tavern closed, and restaurants and grocery stores FORBIDDEN to sell beer or wine, the bootlegger would soon be back—and along with him the speakeasy, the gangster, crime and graft. Initiative 13 is a PROHIBITIONISTS' measure. Study it for yourself. Work against it. Vote against it. *Don't let Prohibition get a foothold again.*

Initiative 13- First Drastic Step Toward Prohibition

Vote ☒ AGAINST

Men & Women Against Prohibition

ELEY P. DENSON, *Chairman*

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1218 NEW WASHINGTON HOTEL • SEATTLE

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Mrs. Charles C. Finucane.....Spokane	L. "Hum" Kean.....Bremerton	Charles C. Ralls.....Seattle	Mrs. Joseph Wohleb.....Olympia

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Harry J. Ames C. P. Constantine
M. O. Anterson Evan "Doc" Corns
H. D. Baker Mrs. Janice Crowson
Mrs. Evva Baldwin B. E. Davidson
Harry P. Banks Kathryn G. Donaldson
Watson S. Barr Dr. Roy Donaldson
R. W. Barron Willis A. Door
Tom Barrow Don Douglas
Teresa F. Belanger Axel Druggie
Dr. J. C. Bennett Victor E. Elfendahl
Ed. J. Beslow Richard Ellis
W. W. Boone Harry S. Bowen
L. D. Bracken L. D. Bracken
Col. W. B. Brinton Ray Fairbanks
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Ralph E. Goodrich Louis Kessler
Jack Gordon H. D. Kimsey
Harry T. Gowman Dr. Brian T. King
Carroll F. Graham Earle W. Knight
Harold E. Gray Dr. R. P. Knowlton
Tilston Grinstead Richard C. Krock
Addis Gutmann George LaFray
O. W. Hardesty Clarence J. LaMare
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W. E. Hinton Arthur G. Lomax
Donald C. Holcomb Juan Lopez
E. E. Hornish Mrs. E. C. Macy
Robert L. Hosey A. L. Martin (Dr.)
Deryl T. Huling Charles Maryatt
Frank W. Hull Frank W. McDermott
Paul Isaacson G. E. McElvain
Col. Fred M. Puecker Cecil H. McKinstry

Dr. L. E. Mellor Alfred Rochester
Charles J. Mentrin Peter Rosaia
Robert G. Moch James Schlosstein
C. Marc Miller W. W. Scruby
Mrs. John L. Moore Harold Sellin
K. A. Moores Lillian Lucile Senf
Allen B. Morgan H. F. Simon
P. J. Morrissey Charles L. Smith
Mrs. Mae Neep Warren G. Smith
A. T. G. (Al) Novak Rudy Spring
John J. O'Brien Paul S. Starr
Don H. Palmer (Dr.) C. F. Steenson
Neil V. Pardo Winifred E. Stewart
Harry S. Pearson Sam Stone
Harry Perkins Byron J. Stubbs
W. B. Perkins George R. Stuntz
O. W. Peterson John J. Sullivan
A. H. Pittack J. A. Swallow
Eloise Pratt E. Reeve Talbot
Lois A. Prochnow Stuart Thompson, Sr.
Victor E. Rabel Frank X. Urquhart
Harry L. Reed D. C. Vaile
Walter G. Rehbein George M. Varnell

Frank West Mrs. A. Weston
Arthur A. Weston George H. Thomas
F. J. Wetrick H. H. Andrews, M.D.
Herbert Witherspoon O. E. Anderson
Walter W. Zemeck Douglas Benson
Robert J. Acheson H. Bentley
Herbert DeBoer Mrs. Dorothy L. Brown
F. J. Dubois W. A. Chamness
Thos. M. Thomsen Anna M. Dalgity
H. L. Underwood A. Y. Drain
Robert H. McCaw Roy M. Escott
Dave S. Turner J. Halls
Frank Castagno C. B. Halverson
M. W. Morrill Mrs. Sylvia Hewitt
Worth Stoneburner Lowell D. King
A. W. Akers, Jr. Wm. E. Lindquist
Don M. Farris R. V. Manning
W. R. "Bill" Barry L. C. Morgan
George Beanblossom L. R. Paulson
Ernest E. Crussell Ray Snyder
Bert Dexter
Ed. Iddings Dist. 1-A

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

LOST 35,000 UNION JOBS IF INITIATIVE 13 PASSES

The Prohibitionists have a measure—Initiative 13—on the November election ballot. It will *prohibit* the present legal, licensed sale of beer and wine in taverns, restaurants, grocery stores.

It's the Drys' scheme to eventually dry up the state completely.

But worse still, it will throw 35,000 union members out of jobs, by closing down the sale of beer and wine in every tavern, restaurant and grocery store in the state. Waiters, waitresses, bartenders, drivers, salesmen, brewery workers will be out of work—jobs will be lost in all the businesses that supply the beer and wine industry. Wives and children, entire families, will be without incomes.

Many, many of these men and women know no other trade. They will have a choice of working at lesser pay, not working at all—or taking jobs in speakeasies AND LOSING THEIR UNION CARDS, in order to make a living.

Don't let the Prohibitionists do this to you. Get out and work among your friends and neighbors—defeat Initiative 13!

**MAINTAIN
WASHINGTON
EMPLOYMENT**

VOTE



AGAINST INITIATIVE 13

Organized Labor Against Initiative 13

John Abrams, Tacoma
Harry J. Ames, Seattle
Ray R. Atkinson, Spokane
Jas. Ballew, Everett
Bereneice M. Barrow, Seattle
Tom Barrows, Seattle
Lewis C. Baum, Port Angeles
Winifred L. Baxter, Seattle
Dave Beck, Seattle
Lois A. Blackmore, Mt. Vernon
William Bonallo, Aberdeen
L. A. Borden, Tacoma
A. A. Bradley, Tacoma
Fred Brokens, Anacortes
Arthur Brown, Marysville
Ray Campbell, Everett
George Cavano, Seattle
Francis H. Chapin, Sr., Tacoma
John M. Christenson, Seattle
L. J. Christian, Seattle
R. L. Clevenger, Jr., Tacoma
Ed. Coester, Seattle
Robert R. Collins, Seattle
W. B. Cook, Bremerton
Gladys J. Conner, Seattle

George B. Corey, Tacoma
Edith C. Cram, Seattle
Maurice Crum, Seattle
Isaac Crumb, Morton
Charles C. Curran, Tacoma
H. J. Davelaar, Tacoma
Elmer Davis, Ellensburg
Rudolf Davis, Tacoma
Nick Diamond, Seattle
Willis A. Door, Seattle
Azul Druggs, Seattle
B. I. Elliott, Jr., Seattle
Paul Elliott, Seattle
James Esap, Tacoma
Lawrence Bubody, Centralia
Michael Fiore, Seattle
John F. Flanagan, Seattle
Tillman Garrison, Seattle
William Gaunt, Seattle
Theola Gierke, Olympia
Mrs. Inez E. Given, Seattle
Wm. K. Given, Seattle
Paul Gomarud, Tacoma
Kenneth L. Gordon, Tacoma
Lester J. Green, Tacoma
Lloyd G. Greger, Bellingham
J. M. Grimes, Mt. Vernon

J. M. Hall, Wenatchee
E. R. Harris, Tacoma
Wm. R. Havens, Tacoma
W. H. Hedberg, Tacoma
Wilbur H. Hendershot, Olympia
Arthur J. Hobbs, Mt. Vernon
J. L. Hofmaster, Pasco
E. W. Holbrook, Bremerton
Ted M. Hopkins, Tacoma
John Jacobs, Tacoma
Dick C. Johnson, Mt. Vernon
Frank Kalbrun, Seattle
Leo Kocher, Tacoma
John Kramer, Seattle
C. Landers, Everett
Margaret Leishman, Spokane
P. H. LeRiviere, Longview
Albert Leslie, Spokane
Bruce Lewis, Centralia
Nelson A. Lowe, Tacoma
Wm. A. Maher, Everett
Arthur D. Malone, Longview
Walter D. Marvick, Bremerton
Charles J. Mentrin, Seattle
H. D. Merrick, Tacoma
Bdythe Mobley, Seattle

Ray Moisie, Tacoma
Paul Mueller, Spokane
Edward J. Murray, Tacoma
C. V. McCoy, Yakima
Doris H. McDonald, Seattle
H. S. McIlvaigh, Tacoma
Margaret McLean, Seattle
R. L. McLean, Seattle
Edw. McNamara, Seattle
Jack Neville, Seattle
C. R. Noble, Tacoma
C. A. North, Tacoma
E. Palmatier, Tacoma
Neil V. Pardo, Seattle
M. T. Pavolka, Tacoma
Neil Pendley, Port Angeles
Ida M. Peterson, Bellingham
O. W. Peterson, Seattle
Elaine Pratt, Seattle
C. W. Rasmussen, Yakima
Steve A. Reay, Tacoma
Harry L. Reed, Seattle
Vernie Reed, Tacoma
Beatrice Rice, Vancouver
Maude Roberts, Longview
C. A. Robertson, Mt. Vernon
A. J. Ruhl, Spokane

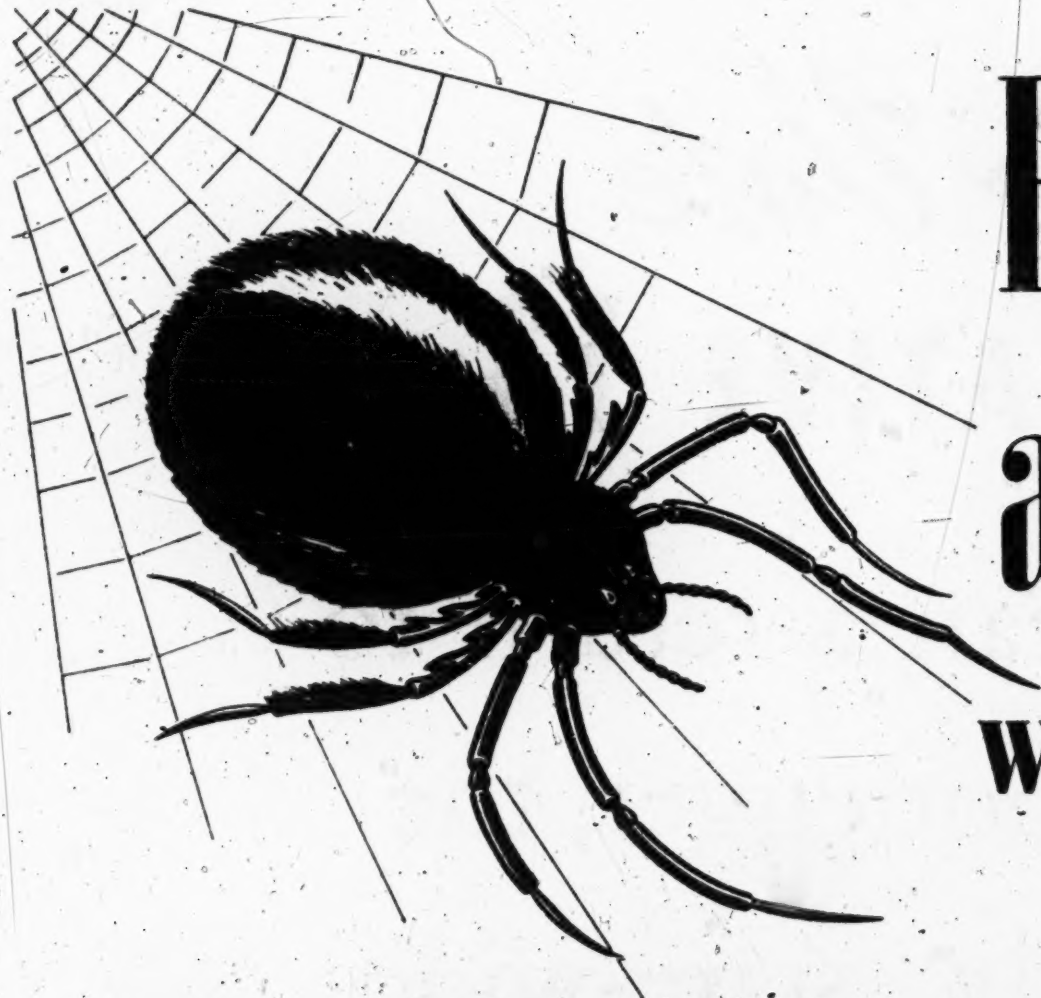
John Salie, Spokane
Harry Satterlee, Tacoma
E. A. Schlecht, Longview
George Siegrist, Wenatchee
E. F. Slawson, Walla Walla
A. L. Smith, Olympia
E. W. Smith, Montesano
Mrs. Marcelle R. Smith, Seattle
Margaret Smith, Port Angeles
R. B. "Jack" Smith, Seattle
Susie M. Smith, Olympia
W. J. Smith, Everett
W. R. Smith, Vancouver
Pearl R. Sowers, Raymond
Thad L. Stevens, Walla Walla
M. P. Townsend, Mt. Vernon
Dave S. Turner, Enumclaw
H. B. Walters, Spokane
L. H. Warner, Tacoma
Eudora Wellander, Seattle
John M. Wellander, Seattle
Roy J. Wolfrenger, Tacoma
Ed. Weston, Seattle
W. W. Westover, Olympia
Fred Wheeler, Tacoma
Walter B. Williams, Everett

Initiative 13-
First Drastic Step Toward Prohibition
VOTE X AGAINST

Executive Committee:

[illegible]

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2



RACKETEERS and CRIMINALS

Will Take Honest Workers' Jobs

IF INITIATIVE 13 PASSES

If Initiative 13 passes, every tavern in the state will be closed, every restaurant and grocery store will be forbidden to sell beer and wine.

What will happen to the 35,000 union men and women now employed in the retail sale of beer and wine and associated trades? Their jobs will be taken over by the speakeasies which will spring up when no more beer and wine can lawfully be sold by the glass. Racketeers, working for criminal bosses, will replace the thousands of union men and women now working under union contracts!

Are you going to let the Prohibitionists put this vicious measure over on union labor? Of course not! Work and vote against Initiative 13. The jobs — the very existence — of your friends and neighbors in labor depend on your vote!

**MAINTAIN
WASHINGTON
EMPLOYMENT**

VOTE ☒ AGAINST INITIATIVE 13

Organized Labor Against Initiative 13

John Abrams, Tacoma
Harry J. Ames, Seattle
Ray R. Atkinson, Spokane
Jas. Ballew, Everett
Bereneice M. Barrow, Seattle
Tom Barrows, Seattle
Lewis C. Baum, Port Angeles
Winifred L. Baxter, Seattle
Dave Beck, Seattle
Lois A. Blackmore, Mt. Vernon
William Bonafio, Aberdeen
L. A. Borden, Tacoma
A. A. Bradley, Tacoma
Fred Brokens, Anacortes
Arthur Brown, Marysville
Ray Campbell, Everett
George Cavano, Seattle
Francis H. Chapin, Sr., Tacoma
John M. Christensen, Seattle

L. J. Christian, Seattle
R. L. Clevenger, Jr., Tacoma
Clara G. Clinton, Seattle
Ed. Coester, Seattle
Robert R. Collins, Seattle
Gladys J. Conner, Seattle
W. B. Cook, Bremerton
George E. Corey, Tacoma
Edith C. Cram, Seattle
Isaac Crumb, Morton
Maurice Crum, Seattle
Charles C. Curran, Tacoma
H. J. Davelaar, Tacoma
Elmer Davis, Ellensburg
Rudolf Davis, Tacoma
Nick Diamond, Seattle
Willis A. Door, Seattle
Aarl Drugga, Seattle
B. I. Elliott, Jr., Seattle

Paul Elliott, Seattle
James Estep, Tacoma
Lawrence Eubody, Centralia
Michael Fiore, Seattle
John F. Flanagan, Seattle
Tillman Garrison, Seattle
William Gaunt, Seattle
Theola Gierke, Olympia
Mrs. Inez E. Given, Seattle
Wm. K. Given, Seattle
Paul Gomarud, Tacoma
Kenneth L. Gordon, Tacoma
Lester J. Green, Tacoma
Lloyd G. Greger, Bellingham
J. M. Grimes, Mt. Vernon
J. M. Hall, Wenatchee
E. R. Harris, Tacoma
Wm. R. Havens, Tacoma
W. H. Hadberg, Tacoma

Wilbur H. Hendershot, Olympia
Arthur J. Hobbs, Mt. Vernon
J. L. Hofmaster, Pasco
E. W. Holbrook, Bremerton
Ted M. Hopkins, Tacoma
John Jacobs, Tacoma
Dick C. Johnson, Mt. Vernon
Frank Kalbstein, Seattle
Leo Koche, Tacoma
John Kramer, Seattle
C. Landers, Everett
Margaret Leishman, Spokane
P. H. LeRiviere, Longview
Albert Leslie, Spokane
Bruce Lewis, Centralia
Nelson A. Lowe, Tacoma
Wm. A. Maher, Everett
Arthur D. Malone, Longview
Walter D. Marvick, Bremerton

Charles J. Mentrin, Seattle
H. D. Merrick, Tacoma
Edythe Mobley, Seattle
Ray Moiso, Tacoma
Paul Mueller, Spokane
Edward J. Murray, Tacoma
C. V. McCoy, Yakima
Doris H. McDonald, Seattle
H. S. McIlvaigh, Tacoma
Margaret McLean, Seattle
R. L. McLean, Seattle
Edw. McNamara, Seattle
Jack Neville, Seattle
C. R. Noble, Tacoma
C. A. North, Tacoma
E. Palmstier, Tacoma
Neil V. Pardo, Seattle
M. T. Pavolka, Tacoma
Neil Pendley, Port Angeles

Ida M. Peterson, Bellingham
O. W. Peterson, Seattle
Eloise Pratt, Seattle
C. W. Rasmussen, Yakima
Steve A. Reay, Tacoma
Harry L. Reed, Seattle
Vernie Reed, Tacoma
Beatrice Rice, Vancouver
Maude Roberts, Longview
C. A. Robertson, Mt. Vernon
A. J. Rubl, Spokane
John Salie, Spokane
Harry Saterlee, Tacoma
E. A. Schlecht, Longview
George Siegrist, Wenatchee
E. F. Skowron, Walla Walla
A. L. Smith, Olympia
E. W. Smith, Montesano
Mrs. Maveille R. Smith, Seattle

Margaret Smith, Port Angeles
R. B. "Jack" Smith, Seattle
Susie M. Smith, Olympia
W. J. Smith, Everett
W. R. Smith, Vancouver
Pearl R. Sowers, Raymond
Thad L. Stevens, Walla Walla
M. P. Townsend, Mt. Vernon
Dave S. Turner, Enumclaw
H. E. Walters, Spokane
L. H. Warner, Tacoma
Roy J. Wellfringer, Tacoma
Eudora Wellander, Seattle
John M. Wellander, Seattle
Ed. Wesson, Seattle
W. W. Whetover, Olympia
Fred Whetover, Tacoma
Wahne E. Williams, Everett

Initiative 13

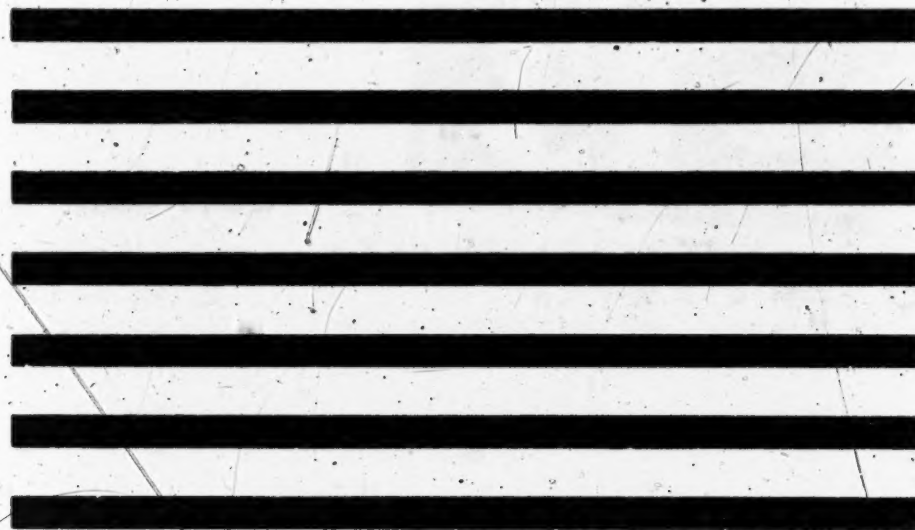
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Who Opposes It?

Sheriffs of the State

Veterans of Foreign Wars

Washington State Federation of Labor



Who Favors It?

Only the Prohibitionists

VOTE ☒ AGAINST Initiative 13

First Drastic Step Toward Prohibition
Men and Women Against Prohibition.....

EXECUTIVE COMMITTEE

Emmett T. Anderson.....Tacoma
Dave Beck.....Seattle
Mrs. John S. Brinkley.....Seattle
Stephen F. Chadwick.....Seattle
George E. Clark.....Yakima
Clarence Coleman.....Everett
L. B. Donley.....Aberdeen
Joseph Drumheller.....Spokane

Perry E. Dye.....Seattle
Mrs. Charles C. Finucane.....Spokane
Cassius E. Gates.....Seattle
James Glenn.....Port Angeles
George C. Grandy.....Vancouver
Joshua Green.....Seattle
William Gurr.....Raymond
Mrs. John H. Hauberg Jr.....Seattle

Joseph L. Hughes.....Wenatchee
Clark Johnson.....Garfield
E. S. Johnston.....Pasco
L. "Hum" Kean.....Bremerton
Roy Lowe.....Spokane
Blanton Luther.....Bellingham
Ernest Mallory.....Olympia
C. V. McCoy.....Yakima

H. S. McIlvaigh.....Tacoma
Mrs. Harry J. O'Donnell.....Seattle
Dr. John H. O'Shea.....Spokane
Ida Peterson.....Bellingham
John T. Raftis.....Colville
Charles C. Ralls.....Seattle
Rex J. Raymond.....Spokane
Mrs. Alfred R. Rochester.....Seattle

A. J. "Ab" Ruhl.....Spokane
E. L. Skeel.....Seattle
Stanley Spence.....Longview
Herbert West.....Walla Walla
William West.....Chehalis
E. M. "Ed" Weston.....Seattle
A. R. Whitman.....Tacoma
Mrs. Joseph Wohleb.....Olympia

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

Don't Bring Back the Speakeasy!

Vote ☒ AGAINST
INITIATIVE 13

MEN AND WOMEN AGAINST PROHIBITION

S-1

INITIATIVE 13 First Drastic Step Toward Prohibition

VOTE ☒ AGAINST

MEN AND WOMEN AGAINST PROHIBITION

S-2

Don't be Tricked into Prohibition!

Vote ☒ AGAINST
INITIATIVE 13

MEN AND WOMEN AGAINST PROHIBITION

S-3

BIGOTRY

***Meaning: if I don't like it
YOU can't have it**

Are you, too, fed up with the number of people who try to tell us what we can—and can't—do?

Take Initiative 13, for instance. It would make it against the law to sell a glass of beer or wine in a restaurant or tavern, or a bottle of beer in a grocery store.

The Prohibitionists who put Initiative 13 on the ballot for a vote think it's a good idea—so they try to make everyone else do as they believe!

One of the cherished American ideas is that each of us should respect the rights of others, and be tolerant of each other's ideas. Thirteen years of Prohibition were enough of telling people by law what they could and couldn't do. It failed.

Besides restricting the rights of others, Initiative 13, by forbidding the sale of beer and wine in taverns, grocery stores and restaurants, means the return of the speakeasy and a drastic step toward Prohibition.

"Big-ot-ry—obstinate and unreasoning attachment to one's own belief and opinions, with intolerance of beliefs opposed to them."

— Webster

Initiative 13— First Drastic Step Toward Prohibition

Vote ☒ AGAINST

Men & Women Against Prohibition

ELEY P. DENSON, Chairman • HARRIE BOHLKE, Executive Secretary
1218 New Washington Hotel, Seattle

Executive Committee:

Emmett T. Anderson, Tacoma	Cassius E. Gates, Seattle	Roy Lowe, Spokane	Rex J. Raymond, Spokane
Dave Beck, Seattle	James Glenn, Port Angeles	Blanton Luther, Bellingham	Mrs. Alfred R. Rochester, Seattle
Mrs. John S. Brinkley, Seattle	George C. Grandy, Vancouver	Ernest Malbury, Olympia	A. J. "Ab" Ruhl, Spokane
Stephen F. Chadwick, Seattle	Joshua Green, Seattle	C. V. McCoy, Yakima	E. L. Skeel, Seattle
George E. Clark, Yakima	William Gurr, Raymond	H. S. McIlvagh, Tacoma	Stanley Spence, Longview
Clarence Coleman, Everett	Mrs. John H. Hauberg Jr., Seattle	Mrs. Harry J. O'Donnell, Seattle	Herbert West, Walla Walla
L. B. Donley, Aberdeen	Joseph L. Hughes, Wenatchee	Dr. John H. O'Shea, Spokane	William West, Chehalis
Joseph Drumheller, Spokane	Clark Johnson, Garfield	Ida Peterson, Bellingham	E. M. "Ed" Weston, Seattle
Perry E. Dye, Seattle	E. S. Johnson, Pasco	John T. Ralston, Colville	A. J. Whitman, Tacoma
Mrs. Charles C. Finucane, Spokane	L. "Hum" Kean, Bremerton	Charles C. Ralls, Seattle	Mrs. Joseph Wohleb, Olympia

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

Prepared by
BOZELL & JACOBS, INC.
Smith Tower, Seattle

**"Who
Sent
You?"**



THE law-breaking speakeasy that bred crime during Prohibition threatens to come back. Initiative 13, on the ballot in the November election, would close every tavern in the state. The alternative to the present legal, regulated tavern is the illegal dive. They will spring up all over the state, if Initiative 13 passes. With them will come the bootlegger to supply them—and the gangster, who will control them. No citizen wants these Prohibition evils back. Work, talk, and vote against Initiative 13.

Initiative 13— First Drastic Step Toward Prohibition

Vote ☒ AGAINST

Men & Women Against Prohibition

ELEY P. DENSON, Chairman • HARRIE BOHLKE, Executive Secretary
1218 NEW WASHINGTON HOTEL • SEATTLE

EXECUTIVE COMMITTEE

Emmett T. Anderson, Tacoma	Cassius E. Gates, Seattle	Roy Lowe, Spokane	Rex J. Raymond, Spokane
Dave Beck, Seattle	James Glenn, Port Angeles	Blanton Luther, Bellingham	Mrs. Alfred R. Rochester, Seattle
Mrs. John S. Brinkley, Seattle	George C. Grandy, Vancouver	Ernest Malbury, Olympia	A. J. "Ab" Ruhl, Spokane
Stephen F. Chadwick, Seattle	Joshua Green, Seattle	C. V. McCoy, Yakima	E. L. Skeel, Seattle
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Clarence Coleman, Everett	Mrs. John H. Hauberg Jr., Seattle	Mrs. Harry J. O'Donnell, Seattle	Herbert West, Walla Walla
L. B. Donley, Aberdeen	Joseph L. Hughes, Wenatchee	Dr. John H. O'Shea, Spokane	William West, Chehalis
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Mrs. Charles C. Finucane, Spokane	L. "Hum" Kean, Bremerton	Charles C. Ralls, Seattle	Mrs. Joseph Wohleb, Olympia

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

Prepared by
BOZELL & JACOBS, INC.
Smith Tower, Seattle

What is Initiative 13?

A brief, factual, question-and-answer explanation of one of the most important measures on your November 2 general election ballot. Study before you vote!

Q. What is Initiative 13?

A. A "dry" or prohibition-type measure, which would prohibit the retail sale of beer and wine by any person except the State of Washington.

Q. Why is Initiative 13 of great public interest?

A. Because it is the first move of the Drys in the State of Washington to bring back state-wide Prohibition.

Q. What would happen if Initiative 13 passed?

A. Every licensed retail outlet selling beer and wine by the glass would close, and the sale of beer and wine would be prohibited by law in every restaurant, grocery store and tavern.

Q. What about the man who only wants to buy a glass of beer, after work or in the evening.

A. He would be out of luck. *There would be no sale of beer by the glass except illegally.* An old, accepted American custom would be forbidden by law; the man who wanted a glass of beer would have to buy it at some illegal dive.

Q. What would be the practical effect of Initiative 13's passage?

A. It would bring back conditions which existed under Prohibition, for it is a drastic restriction on the sale of beer and wine. Because beer and wine would not be freely sold speakeasies would spring up, just as they did during Prohibition—followed by bootleggers, gangsters, crime and graft.

Q. Why do you say that?

A. *Because we proved during Prohibition that when you prohibit the legal tavern, the illegal dive takes its place.*

Q. Who is sponsoring Initiative 13?

A. The Washington Temperance Association, successors to the old Anti-Saloon League, and

official Prohibition organization of this state. They wrote the measure, and are actively promoting it.

Q. Who is opposing Initiative 13?

A. Many substantial and reputable citizens and organizations; among others:

Washington State Sheriffs' Association
Veterans of Foreign Wars
Washington Federation of Labor
Disabled American Veterans
Seattle Central Labor Council
2,200 Members of "Men & Women Against Prohibition" (see below)
American Legion

and thousands more throughout the state. The state Sheriff's Association stated in a resolution:

"Initiative 13 . . . would result in the springing up of speakeasies, bootleggers . . . would generally foster lawlessness and result in increased sales to minors through illegal sources, just as similar restrictive measures did during Prohibition."

Q. The term "Prohibition" has been used several times in relation to Initiative 13 — on what ground?

A. Read the first line of the measure as reproduced below (and remember, it is sponsored by the Prohibitionists):

"AN ACT prohibiting the retail sale of beer and wine . . ."

Initiative 13 is a scheme to trick the people into the first long step toward statewide Prohibition. If the Drys win Initiative 13, the resulting crime, gangsterism and corruption will—they hope—discredit the entire present system in Washington and make their final step, complete Prohibition, so much easier.

This Is How Initiative 13 Will Appear on Your Ballot Nov. 2:

Initiative to the Legislature No. 13

"AN ACT, prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

☐ FOR

☒ AGAINST

Men and Women Against Prohibition

ELEY P. DENSON, *Chairman* • HARRIE BOHLKE, *Executive Secretary*

1218 New Washington Hotel, Seattle

Executive Committee:

Emmett T. Anderson, *Tacoma*
Dave Beck, *Seattle*
Mrs. John S. Brinkley, *Seattle*
Stephen F. Chadwick, *Seattle*
George E. Clark, *Yakima*
Clarence Coleman, *Everett*
L. B. Donley, *Aberdeen*
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George C. Grandy, *Vancouver*

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Clark Johnson, *Garfield*
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Rex. J. Raymond, *Spokane*
Mrs. Alfred R. Rochester, *Seattle*
A. J. "Ab" Ruhl, *Spokane*
E. L. Skeel, *Seattle*
Stanley Spence, *Longview*
Herbert West, *Walla Walla*
William West, *Chehalis*
E. M. "Ed" Weston, *Seattle*
A. R. Whitman, *Tacoma*
Mrs. Joseph Wohleb, *Olympia*

W-4

VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

The Prohibitionists

Attack Your Corner Grocer!

The Prohibitionists, promoters of Initiative 13, would have you believe it is aimed entirely at the tavern... **THAT IS FAR FROM THE TRUTH!**

Actually, it also affects the retail grocers. Initiative 13, if passed, would PROHIBIT the sale of beer and wine by more than 1,700 retail grocers in the state.

These grocers are substantial citizens of their communities. Their customers are people who enjoy an occasional glass of beer or wine at home, a temperate American custom.

Initiative 13, besides being a drastic step toward state-wide Prohibition, is, we believe, unfair both to the grocery business and to its customers. We urge our friends and fellow citizens to

Vote ☒ AGAINST Initiative 13

Retail Grocers Against Initiative 13

COMMITTEE

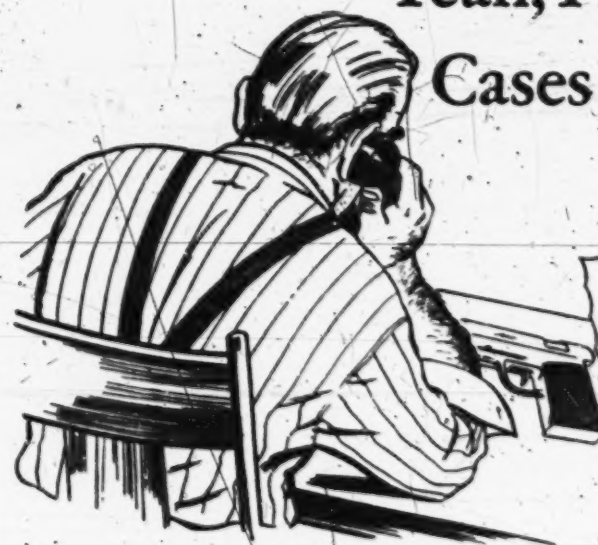
H. R. McCallough, Seattle
Geo. J. Smith, Spokane
W. D. McClelland, Seattle
Max A. Anderson, Seattle
Irving R. Nelson, Seattle
Harold R. Nelson, Seattle
A. C. Mar, Seattle
Lester C. Perkins, Tacoma
Herman Hebel, Tacoma
Hans Anderson, Everett
J. F. O'Connor, Everett
C. A. Matteson, Everett
Ben Haggren, Bellingham
Neil Wamaker, Bellingham

E. E. Orchard, Bremerton
Frank Mangum, Bremerton
Myron W. Massey, Auburn
D. A. Ramsey, Kelso
Mike W. Latta, Kelso
Al LaFreniere, Puyallup
Neil A. McClane, Sumner
Carl Roder, Olympia
Irving M. Peterson, Olympia
Harry S. Hammond, Aberdeen
Frank E. Rattie, Aberdeen
Chas. H. Swanson, Hoquiam
Glen Townsend, Montesano
Raymond D. Spurvell, South Bend
Wm. G. Singer, Centralia

Alfred M. Warmuth, Chehalis
N. Rittenhouse, Vancouver
W. T. Whore, Kelso
Melvin I. Beacham, Mt. Vernon
Wilmer N. Hanson, Sumner
Edward F. Herman, Port Angeles
William A. Blagden, Port Angeles
Otto Sorge, Port Townsend
A. M. Heindelmann, Spokane
Fred S. Stager, Spokane
Neal A. Weaver, Spokane
James A. Blodgett, Spokane
Jasper Wilson, Spokane
George Cahoon, Yakima
John P. Giesner, Yakima

William Sperry, Wenatchee
C. G. Armstrong, Wenatchee
Maurice W. Wippel, Ellensburg
C. G. Baker, Tappan
George A. Schalew, Okanogan
Lee Frank, Tonasket
W. B. Lane, Colville
James Shaw, Colfax
A. Reynolds, Pullman
William Boover, Walla Walla
Carl D. Frank, Walla Walla
Howard F. Bess, Kennewick
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BOZELL & JACOBS, INC.
Smith Tower, Seattle



"Yeah, I'll bring Two Cases After Dark"

One of the Evils of PROHIBITION

THE bootlegger again has his foot in the door in Washington. Initiative 13 would PROHIBIT the present legal, licensed sale of beer and wine. With every tavern closed, and restaurants and grocery stores FORBIDDEN to sell beer or wine, the bootlegger would soon be back—and along with him the speakeasy, the gangster, crime and graft. Initiative 13 is a PROHIBITIONISTS' measure. Study it for yourself. Work against it. Vote against it. Don't let Prohibition get a foothold again.

Initiative 13— First Drastic Step Toward Prohibition

Vote ☒ AGAINST

Men & Women Against Prohibition

ELEY P. DENSON, Chairman HARRIE BOHLKE, Executive Secretary
1218 NEW WASHINGTON HOTEL • SEATTLE

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VOTE ON INITIATIVES AND CONSTITUTIONAL AMENDMENTS—TOP OF BALLOT, NOV. 2

Prepared by
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ALTHOUGH DRY SINCE 1880 . . . KANSANS

'DRY' 67 YEARS, KANSAS IS NOW OASIS OF WEST

Liquor Everywhere—if
You've Got Price

(Fourteen years after the repeal of national prohibition, three states are legally dry—Kansas, Oklahoma, and Mississippi. This article and others to follow describe conditions in these states.)

BY CLAYTON KIRKPATRICK

(Chicago Tribune Press Service)

Topeka, Kas., March 4—When the glossy, streamlined trains running from Chicago to California cross the Kaw or the Missouri rivers, the club car stewards out away their little ounce and a half bottles of whisky. Beer and ale is replaced by a 3.2 brew. The parching traveler may slake his thirst with this or wait until he gets to Colorado or Arizona. He knows then he is in "dry" Kansas.

In Kansas the "dry" prefix is almost invariably in quotation marks if written. If spoken it is still there in vocal inflection. The reason is that about the only people who can't buy a drink in the state are travelers in club cars.

Vote Dry and Drink Wet

There's an old saying in the state [which has been "dry" since 1880] that a man is never more than 20 minutes from a drink in any town of more than 500 population. There's another that Kansans will vote dry and drink wet as long as they can stagger to the polls.

The validity of the latter will be tested in 1948 when the electorate will get another chance to vote on repeal of the state constitution's dry amendment. Political bookmakers won't give you odds either way on how this election will go.

The legislature authorized the submission of the amendment by a margin of three votes in the house of representatives, tho it was backed by both parties and rushed thru before the state's dry forces could organize. They'll have time before '48, but the wets are counting on support from younger voters—especially ex-service men who have observed conditions in states where liquor may be bought and sold legally.

Leavenworth Wide Open

Meantime, how is it in Kansas? Suppose you stop at Leavenworth, a city of 19,000 across the river from Missouri. It has a reputation for being a "wide open" town in the old western sense. Local historians will tell you with a tinge of pride that "nobody ever has or ever will dry up Leavenworth."

The founding fathers, they say, who rowed across the Missouri in 1854 carried with them surveying instruments, stakes, mauls, and a barrel of whisky. Whisky has been part of the local scene since then. Records of the collector of internal revenue in Kansas show that Leavenworth county claimed 79 retail liquor dealer federal tax stamps since last July 1.

U. S. Gets Its Share

Tho a stranger might consider it odd that the federal government would sell retail and wholesale tax stamps to bootleggers [it's too dangerous to do business without them], the truth is that the certificates may be purchased by any one the same as postage stamps or, for that matter, the same as the federal government will sell a stamp to be affixed to an illegal Illinois slot machine as evidence that the federal government is getting a share of the take.

A peculiarity of prohibition pops up in this connection. Each stamp buyer must give the address of his place of business. Thus the identity and headquarters of every big bootlegger in Kansas is a matter of record—a record which is supplied periodically to the states attorney general and published from time to time in newspapers.

They're Leading Citizens

Bootleggers hardly need this notoriety, however, since ordinarily they are well known in their communities as men of wealth and influence, friends of sheriffs and prosecutors, generous sources of campaign funds, and rarely guests of county jailers. It is the custom of Kansas judges, influenced by the peoples' will, they say, to admit bootleggers to parole after serving three days of a 30 day sentence.

By last October Leavenworth had become such a notorious town that the federal government decided to step in and clean it up. Proceeding under the 1936 liquor enforcement act, the United States attorney indicted the mayor, police chief, and an assortment of others on charges of conspiracy to violate laws which, in effect, forbid the importation of liquor into a dry state.

*Thirsty?
Make a
short
stop-over*

*This can
happen in
Washington
state*

*Very handy
for
strangers*

CAN BUY LIQUOR TO HEART'S CONTENT

All Are Acquitted

Last month the case came to trial. Judge Arthur J. Mellott, in federal District court, directed a verdict of not guilty against the mayor and two others, while the jury freed the police chief and the remaining defendants. Evidence was presented that liquor had been brought in, bought and sold, protection given and paid for. The defense did not deny these charges, but insisted that there was nothing conspiratorial about them. There is another old saying in Kansas: "Juries never convict bootleggers." If you ask why, the answer is "people wouldn't stand for it."

While the trial was in progress in Kansas City, Kas., this reporter visited Leavenworth. The heat wasn't on. We walked into Ann's Place on 5th st., across from the police station. Anna Podowski, the owner, had testified the day before in the trial that she had bought some of her stock from some of the accused bootleggers.

"Can we get a drink?" we asked hesitantly, a stranger.

Anna poured a jigger of bourbon and a glass of water and asked for 40 cents. It was the same in "The Friendly Tavern" on Delaware st.—Leavenworth's main street. Nobody had dried up Leavenworth.

No State Tax to Pay

Of course there was no state tax to pay in Kansas, only a beer license to buy, and the graft, according to the trial testimony, was about \$750 a month. Reasonable prices still netted a tidy profit.

In Topeka things were a little different. The legislature was in session and the joints were pretty well closed down. However, the bellboy in our hotel offered a fifth of Old Taylor whisky for \$14. A common retail price in Illinois is \$6.75.

"The price is a little higher if there's a convention in town or a big crowd," the bellboy said.

Most of the drinking in Topeka, we discovered, is done in homes supplied by bootleggers delivering in answer to telephone calls; in fraternal, social, athletic, or ex-service men's clubs, and in hotels where everybody has his own bottle and orders setups for highballs.

Wichita, Kansas' oil capital and aviation manufacturing center, is another wide open town—only it is Sedgwick county rather than the city itself that is open. The outskirts are rich in package stores, bars, gambling joints, and road houses.

Prohibition is responsible for this travesty on justice

Open violations of the law are flaunted

And who's responsible for this black market racket? The Drys!

"Oasis of the West"

During the war the city was the oasis of the west. Better brands of liquor disappeared in the adjoining states where they would be subject to OPA ceilings. They sold in Wichita for double the legal ceilings in stores where wares were set out on open shelves—available to anybody, man, woman, or child, in any quantity he could pay for.

Last November federal agents, operating under the same law tested in Leavenworth, swooped down on Wichita and seized 1,000 cases of liquor in one day. There have been other raids since then, the legality of which has been upheld by the Supreme court.

Meantime, the package stores operate in windowless, thick walled rooms with locked doors. The customer names his brand thru a slit in the wall and puts his money in a drawer which slides thru it. A few seconds later his bottle and his change come out the same drawer. You still can get anything you want, but you can't see the seller. The device also is pretty good protection against hijackers and hold-up men.

Chicago in the 20's, or can this be Kansas?

CROOKED POLITICS, BOOTLEG CRIME SYNDICATE,

A U.S. ATTORNEY IN DRY KANSAS RIPS PROHIBITION

Finds Bootleggers Sell Even to Children

(This is the second of a series of articles describing the liquor traffic in the dry states of Kansas, Oklahoma, and Mississippi.)

BY CLAYTON KIRKPATRICK
Copyright: 1947: By The Chicago Tribune

Topeka, Kas., March 5—Few public officials in Kansas know more about the illegal operations of bootleggers than United States Atty. Randolph C. Carpenter. Since he took office at Topeka in February, 1945, he has devoted much of his energy to attempts to smash the illicit trade. His efforts so far have crippled, but not destroyed, the big bootleg crime syndicate centered in Wichita.

"Prohibition is one of the greatest evils of our time," he said in an interview. "It has brought conditions worse than the old saloons. Bootleggers sell to anybody, high school students, even children, in any quantity. There is no possibility of lawful regulation. The illegal traffic is the state's biggest source of graft."

Mayor Is Acquitted

Carpenter personally prosecuted the Leavenworth bootleg conspiracy case in which the city's mayor, police chief, and leading bootleggers were acquitted last month. After the trial he remarked: "The defense was primarily a criticism of the Kansas dry laws, and the verdict would appear to be against their enforcement."

Carpenter had better luck last fall in Wichita where he managed to send three bootleggers to a federal penitentiary for two years. He also convicted the crime syndicate bosses of Kansas, Max Cohen and Robert L. [Bobby] Carnahan, on income tax evasion charges.

a shameful indictment!

In the latter case he charged that Cohen and Carnahan were "protection" brokers for bootleggers, gamblers, slot machine owners, and horse race bookmakers, and that they had failed to pay a total of \$163,000 in income taxes in 1941 and 1942. They pleaded nolo contendere [no defense], paid \$15,000 each in fines, agreed to pay tax deficiencies and penalties, and were let off with four years probation.

Rarity in Kansas

Some of the curious at the proceedings were disappointed by the plea which precluded long court hearings. Who sold the "protection" bought by Cohen and Carnahan was not disclosed.

Carpenter's outspoken criticism of prohibition is a rarity in Kansas where a wet label is generally regarded as a political kiss of death. His views are shared, however, by most enforcement officials at all levels of government. A Topeka police official who warned that he could not identify himself with a public statement spoke as follows:

"Prohibition is the policeman's biggest headache. We can't enforce the law because the people don't want it enforced. If we arrest a man and take him into Circuit court for running liquor, he is fined \$200 and given a 30 day jail sentence. He serves three days and is admitted to parole. The occasional \$200 fines are considered a part of the cost of doing business."

Not Much Fixing

"Here the bootleggers don't do much fixing of cops and local enforcement officers. They find it cheaper to pay a fine now and then. The courts collect what you might say is a tax. The county attorney benefits from it too because he gets \$25 for each bootlegger convicted and \$100 from the sale of his car if it is seized."

"Conditions could not be like that if there were really popular demands for enforcement, of course. We have an habitual criminal statute, but bootleggers convicted a hundred times are never tried under it. A Kansas jury would not convict them."

Top political figures in Kansas are at a cross roads so far as prohibition is concerned. Last fall the Democrats parted with precedent and tried to elect a governor on a repeal platform. The candidate, Harry H. Woodring, former secretary of war, cut a 1944 Republican majority of 232,000 to 50,000 votes. He believes he was defeated not by the dries, but by the bootleggers and their customers.

An Equivocal Position

Until it is clear whether repeal has lost its political taboo, the

This doesn't happen in a well regulated state.

Bootleggers take no chances they vote.

GRAFT . . . RESULT OF KANSAS PROHIBITION

present Republican officials take a safely equivocal position with respect to prohibition.

Gov. Frank Carlson, who formerly represented Kansas' 6th district in congress, has this to say about it:

"I believe prohibition has been a good thing in Kansas. I'm speaking as an individual and my views are not necessarily those of my party. This is not entirely a party issue. It crosses party lines."

The governor was asked if there had been any graft or laxity in enforcing the law as the Democrats had charged in the campaign.

He replied: "I don't know where I could buy a drink if I wanted one."

At General Election

Gov. Carlson has a reputation for being not only politically dry but personally dry as well. In the gubernatorial campaign he countered the Democratic repeal plank with a pledge to use his influence in the legislature to have the prohibition amendment resubmitted at a general election.

He redeemed his pledge this year in the early days of the session, but it is predicted he will be against repeal in 1948. The measure must carry only a majority of those voting on it. Wets are hopeful that a new crop of voters, many of them ex-service men who have observed conditions where liquor is legal, will decide the issue in favor of repeal.

In addition to voting for a general election on repeal the legislature enacted a law which makes possession of a federal retail or wholesale liquor dealer's tax stamp prima facie evidence of maintaining a common nuisance. It was passed

*"See no evil,
hear no evil,
speak no
evil."*

by overwhelming majorities in both houses.

A Penitentiary Offense

With this law enforcement officers could padlock by injunction every liquor dispensing establishment in the state that had a federal tax stamp. Practically all bootleggers have them because failure to buy them is a penitentiary offense while violation of the state prohibition law is a misdemeanor.

It is expected to bear especially hard on the clubs where those in the upper economic brackets and most of the legislators who drink wet and vote dry, do their tippling.

*No need for
extra
legislation
under
Washington's
system*

BONDED LIQUOR BUYS "DRY" VOTES IN "WONDER"

BOOTLEGGERS FIGHT TO KEEP OKLAHOMA DRY

Some Sheriffs Also Oppose Repeal

(This is the third of a series of articles describing liquor traffic in the dry states of Kansas, Oklahoma, and Mississippi.)

BY CLAYTON KIRKPATRICK
(Chicago Tribune Press Service)

Oklahoma City, March 7 — The Oklahoma legislature now in session here has before it a bill calling for a special election to repeal the section of the state constitution prohibiting the sale, manufacture, transportation, and possession of intoxicating liquor. The bill has created a brisk demand for both dry and wet votes, with the state's bootleggers and some of its sheriffs lobbying on the dry side to protect their vested interest in prohibition.

Price of a Dry Vote

An informal exchange has grown up in and around the hotel in which many of the legislators have their headquarters. In this exchange it is reported that whisky by the case is the currency, with two cases of bonded liquor described as the price of a dry vote. And it is said that even tho the legislator would vote dry to satisfy his constituency, he might get the two cases of "green label" anyway. The liquor gets this name from the fact that it bears a green federal revenue stamp.

The legislators' hotel is known as one of the most convivial in town. Bell boys report a brisk business in totting trays of ice and mixers to various rooms and some of the old timers among the lawmakers assert they are having one of the most interesting sessions in years.

*Bootleg prices high—
"dry" votes
are cheap*

Doubt Its Passage

Most observers here believe the bill has small chance of passage. It was voted off the house calendar early in the session, but regained its place, by a margin of one vote, two weeks later. Even if it passes the legislature its chances are poor since a constitutional amendment must be approved by a majority of all voters in a general election and failure to mark the ballot is in effect a vote against the measure.

Most of Oklahoma City is pretty dry. A bootleg war that got completely out of hand has inspired a crack down by enforcement officers which has pushed hotel bellboys' prices to \$18 a fifth for bonded bourbon and bootleggers' prices to \$16 for the same stuff delivered.

Trouble among the city's liquor dealers was started by four small bootleggers who, it is charged, kidnapped a big bootlegger and his telephone operator and tried to take over his car, his nightclub, his stock, and a \$4,500 bank roll. Midway thru the job a radio report of the kidnapping was broadcast.

A Capital Crime

A short time later all six walked into the office of Sheriff Dick Strain to "surrender." [Kidnapping is a capital crime in Oklahoma]. They told a story about a drinking party and a little joke, but the victim later testified at a preliminary hearing that his abductors boasted they had "fixed it with the sheriff" to take over his business.

In Tulsa, Oklahoma's oil metropolis, which has a reputation for being a wide-open town, conditions were somewhat better for a thirsty citizen. Prices quoted by a hotel bell boy were as follows: \$14 a fifth for green label [bonded] and \$11 a fifth for red label [blended]. Pints sold for \$8 and \$6 respectively.

However, when it is considered that the price of fifths for the same liquor is about \$6.75 [bonded] and \$3.75 [blended] in Illinois, it becomes apparent that bootleggers can well afford to attempt to buy a few votes in the legislature.

More Reasonable Prices

Only the man in a hurry or a naive stranger buys from bell boys in Tulsa, however. Prices of the big bootleggers are more reasonable and the service is almost as good. The business is carried on almost entirely by telephone, and you get

*Chicago
Gang
Style*

STATE . . . BOOTLEGGERS STAY IN BUSINESS

telephone numbers on little cards distributed in taverns, night clubs, movie lobbies, street corners, and all the other places crowds congregate.

A friend of ours said he needed a little new stock, and invited us over to his office for a demonstration on how the system works.

"I buy from one of the biggest bootleggers in town," he said. "He's honest and dependable and his prices are right. Maybe he'll come himself instead of sending a runner and you can ask him about his business."

Six Pints for \$36

We walked into his office at five minutes past three in the afternoon. My friend looked at a card for the number and twirled the dial. At 3:20 a substantial looking citizen walked in with a brown paper bag under his arm. He had six pints of Old Taylor which he exchanged for a \$36 check. The bottles bore Missouri state tax stamps.

He took off his hat and sat down to chat with us. He remarked that liquor was becoming more plentiful and that his prices were coming down. "That stuff was about \$12 a pint during the war," he observed.

The rest of the interview follows:

Q.—What do you get for blended whisky?

A.—Four or \$4.50 a pint, depending on the quality.

About the Profits

Q.—How do the profits from this business split up?

A.—Well, the distributor who brings it across the border gets from \$12 to \$20 a case. I try to get from \$1.50 to \$2.50 a pint for delivering it. I buy blends for about \$60 a case and sell them for \$108.

Q.—How much is sold in Tulsa per week?

A.—I guess maybe 500 cases.

Q.—At \$50 a case that would be \$25,000 a week profit for retailers.

A.—About that.

Q.—What do you pay for protection?

A.—Nothing.

Q.—How about overhead?

A.—I pay my runners (delivery boys) \$75 a week plus a car allowance. If they are arrested I pay their fines and full salary any time they spend in jail.

Q.—Do they spend much time in jail?

There's no such thing as an honest - dependable criminal.

This much liquor traffic isn't very dry.

Jail Sentences Suspended

A.—No. If they are caught, they usually draw a \$50 fine and a 30 day suspended jail sentence. The fine is just part of the cost of doing business.

Q.—How long have you been in business?

A.—I started selling corn liquor in 1916, but I found it better to handle tax paid stuff. There's no trouble from the government then if you buy a tax stamp. I'm thinking of retiring. I have a ranch, but I'm too busy to get out to it.

A few minutes later he left and my friend observed: "He got a jail sentence once and ran his business from a jail cell for a month. A bootlegger performs a service to the community here, and the community doesn't try to make it too hard for him."

Less Open Than Kansas

To the observer it seemed that compared with Kansas, the liquor traffic in Oklahoma is less open and its product more expensive. This observation is borne out by reports of the federal alcohol tax unit which devotes most of its energies to stamping out moonshine stills.

A stronger attempt to enforce the law has stimulated the moonshiners of the blackjack thickets who can't resist the profits possible where the federal tax on alcoholic drinks is \$9 a proof gallon and the local government has enabled bootleggers to add almost as much more as a cost of engaging in an illegal business.

Despite the sugar shortage tax agents have seized an average of about 150 stills a year in Oklahoma as compared with slightly under 50 from Kansas, Arkansas, and Missouri combined. The greater activity of moonshiners in Oklahoma is also attested by the fact that the force of agents working in Oklahoma is about one-fifth larger than the force in each of the other three states.

MARKET, COLLECTS MILLION IN TAXES

By this time we were on the bridge. Traffic was jammed. It was Michigan av. bridge at 5 p. m. and about the same proportion of taxicabs. We crossed and passed two or three establishments that looked like filling stations without gas pumps. The driver swung in on the gravel drive of one and a burly man in a leather jacket opened the door. "What'll you have?" he grunted.

"Let's see what you've got," we replied, plucking up courage.

He led the way into his shack where he threw open the doors on two large wooden lockers. The stock was complete. Whisky, wine, rum, and gin with prices scratched on the rough wood in front of each row of bottles.

Cab Driver Gets His

We had been told that one of the virtues of the Gold Coast was low prices comparable to those in wet states. It wasn't true. Bonded bourbon was \$5.50 a pint—only 50c under the bootlegger's delivered price in Tulsa. We bought a pint of cheap blend with a legend on the label that it had been flavored and colored with wood chips and aged less than a month. That was \$3.

As we left the salesman gave the cab driver two quarters. That's the regular commission for bringing customers, he explained later. He also said that cab drivers would make the run anytime for a dollar and save a customer the bother of riding along.

Vicksburg and Warren county are wet "by local option" as the natives say. There are open saloons on the main street—Washington st.—and most of the side streets where you can buy a drink, a bottle, or a case.

\$14,000 in Income Taxes

In addition most of the cafes and grocery stores sell bottles under the counter. Because the trade in liquor is so common prices are very reasonable. We visited a small saloon half a block off Washington st. and bought a bonded bourbon highball for 40c. On the shelf was a row of Haig and Haig pinch bottle Scotch whisky. It commonly sells in Chicago for \$9.35 a fifth. You can have as much as you want, the bartender said, for \$9 a fifth.

The "Dregs" must be proud of this type of business man.

We asked him if business was good.

"We paid \$14,000 in income taxes and black market taxes [the Mississippi state liquor tax] last year," he said.

Vicksburg has a special attraction for bibulous visitors in the form of an old river boat called "Show Boat." It has been moored for years in the Yazoo river canal less than 100 yards from the city waterfront. In order to compete with the low liquor prices in the city, it offers excitement in the form of slot machines and other gambling. The little ferry boat that serves it chugs busily back and forth from late afternoon until early morning.

Gulf Resorts Wet

The story is the same up and down the river. Greenville and Natchez are dripping wet, and Rosedale, a village in Bolivar county, on the river, has two package liquor stores.

Equally as wet as the river counties are the vacation resorts along the gulf coast. Chicagoans visiting the gulf coast. Chicagoans visiting Biloxi find a familiar piece of furniture in the Buena Vista bar. It is the gleaming liquor dispensary over which guests of the Stevens hotel sipped cocktails and highballs before the hotel was taken over by the army early in the war and the bar sold down the river.

Smarter than Capone... they paid income tax.

Washington has no such mockery of its state law.



LEGISLATORS DRINK "WET" — VOTE "DRY" IN

THEY'D SOONER FORGET DRY LAW IN SOONER STATE

It Proves a Headache for All but Crooks

(This is the fourth of a series of articles describing liquor traffic in the dry states of Kansas, Oklahoma, and Mississippi.)

BY CLAYTON KIRKPATRICK
(Chicago Tribune Press Service)

Oklahoma City, March 8—In Kansas the United States attorney and the state attorney general have assumed some responsibility for prohibition enforcement, but in Oklahoma local sheriffs, county attorneys, and police chiefs carry the whole burden. Some of these local officials are among the state's most outspoken critics of prohibition.



Warren Edwards

Warren Edwards, county attorney of Oklahoma for the last three years, a bluff westerner who wears cowboy boots and speaks without a politician's caution, brands prohibition a "hypocritical farce."

"This state will never be dried up by a bunch of drunken legislators voting dry," he growled. "The partisans of prohibition are a disgusting combination of bootleggers, grafters, hypocrites, and blue noses."

Like a Dragon Harvest

"There are 1,000 cases of whisky sold in Oklahoma county every week for an average profit of \$60 a case. That's \$60,000 profit a week. If you're looking for graft, start from there. My office is loaded with bootleg cases. One of my assistants does nothing else but prosecute them. It's like harvesting dragon's teeth. They spring up as fast as we bat them down, and the reason is the people don't support law enforcement when prohibition is involved."

"If people want a drink, they'll get it regardless of the law. Under prohibition all the profit goes to crooks. The state gets no revenue and has no control."

Police Chief Roy Hyatt of Tulsa holds similar views. "We average two raids a day," he said. "I have five men who do nothing else. But we can't enforce the law because it does not have popular support. If people really wanted the state to be dry bootleggers wouldn't have enough business to support themselves. I couldn't stop bootlegging if I assigned every man I have to the job. It would just raise the prices a little."

Calls It "Terrible Mess"

L. J. Hilbert, chief of the Oklahoma City police, said: "Prohibition is a terrible mess. It's discouraging to a policeman to arrest a man time after time and know that the maximum penalty will be

a \$20 fine. I have 10 men on my vice squad and they manage to keep the traffic fairly well under cover."

"Our greatest obstacle to enforcement in this city is that the bootleggers keep their stock in the county beyond the city limits and just run in a few bottles at a time to fill orders. As long as they can defy the law in the county we'll have trouble enforcing it in the city."

Altho top political leaders in Oklahoma are careful not to say anything against the prohibition section of the state constitution, and not much for it, there are some voices raised against it in the state house of representatives. Rep. William Shipley, who also is superintendent of schools at Bristow, Okmulgee county, and Rep. Charles G. Ozmun, an attorney from Lawton, Comanche county, are the leading wets.

Neither is especially optimistic that a bill they sponsored calling for a special election to repeal prohibition can get thru the legislature this session. It got 48 votes, enough to keep it on the house calendar, early in the session, but it will need 60 to pass.

The Dry Line-Up

"Here's the lineup against us," said Shipley. "The bootleggers and many of the sheriffs are against us because prohibition is their bread and butter. Brewers are against us because prohibition creates more demand for beer. Distillers are indifferent because they sell all they can supply to Oklahoma. Many of the legislators, especially in the senate, are against us because their best clients are bootleggers. Then there are the United Dries who believe, in spite of the evidence to the contrary, they can legislate morals."

This is why Prohibition never works!

He'll probably be defeated in the next election for telling the truth.

Crooked politicians, bootleggers, both children of Prohibition

OKLAHOMA. REPEAL DOESN'T HAVE MUCH CHANCE

"When this bill came up on a preliminary vote a friend of mine called and said he had to vote dry because he represented a dry county. However, he had been offered two cases of green label [bonded whisky] for his dry vote by a couple of deputy sheriffs, and he wanted to know if I thought he should take them. I told him: 'Sure, that's the going price. You might as well take the stuff same as the others who are voting dry.'"

"On the positive side," Shipley continued, "we have quite a few representatives who are waking up to the fact that the bootleggers are electing our sheriffs, that the state is losing 10 to 12 million dollars in tax revenues annually to neighboring states, and that our boys and girls are becoming alcoholics because there is no legal regulation of the bootlegger's business."

Governor on the Fence

Both factions in the capital are warily watching the new Democratic governor, Roy J. Turner. So far his position has been a scrupulously guarded straddle.

He was asked at his press conference if he would support or oppose resubmission of a repeal amendment to the electorate. "Resubmission of this amendment is not part of my program or the party's program," he replied.

"Is prohibition good for Oklahoma?" he was asked.

"I don't want to comment on that," the governor answered.

"Does your administration have any intention of tightening up enforcement or stamping out graft?"

"Enforcement is a local matter. The state has no agency or responsibility to enforce prohibition."

One Woman's Opinion

One of the opponents whom Turner defeated last fall was a woman—the first woman candidate for governor since the state was admitted to the union in 1907. What was more unusual, she pledged herself to repeal prohibition if elected. The candidate was Mrs. Mickey Harrell, a widow and long time resident of Oklahoma City who achieved wealth thru her own real estate and investment business. She was also a leading member of the city's Church of God congregation and a Sunday school teacher.

"I am a believer in clean government," she said in an interview, "and one of the greatest contributing factors to political corruption is the bootleg system because it places in the hands of underworld elements millions of dollars of illegal capital which is being used to corrupt our elected officials."

"Bootleggers prey on the young and weak," she continued, "and our youth is being corrupted and taught

a disrespect for law because of the ease with which they are able to purchase intoxicating liquors from bootleggers who are protected by politicians.

"In states where the sale of intoxicating liquors is licensed by the state, rigid control laws are possible, but in a state where the federal government issues liquor licenses, and where the state has a dry law such as we have in Oklahoma, we open the door to the racketeers, gangsters, and underworld characters who grow fat upon our stupidity."

The opposite view was expressed by W. J. Herwig, state superintendent of the Anti-Saloon League of Oklahoma.

"The evil in liquor is in proportion to the sale of liquor," he declared. "Any move to make it easier to get would increase the evil. The solution to the problem is strict enforcement and education emphasizing the value of temperance."

"The law has not been vigorously enforced for about five years. We're going to campaign for strict enforcement. If that requires replacement of some sheriffs and county attorneys, we'll have them replaced."

Herwig was asked why the Oklahoma United Dries were fighting the proposal in the legislature to submit prohibition to a popular vote.

"Sentiment hasn't changed since 1940 when the last vote was taken," he asserted. "Sixty-eight counties voted for prohibition and nine voted for repeal then. Decent people are not willing to throw still wider the floodgates of liquor. There's no need for another vote."

This kind of political jockeying

defeated this honest, clear thinking candidate

Washington state's system is a better solution

Are there no decent people in those nine states?

MISSISSIPPI CONDONES LIQUOR BLACK-

DRY MISSISSIPPI GETS A MILLION IN LIQUOR TAXES

Bootleg Black Market Openly Pays Up

(This is the fifth of a series of articles describing liquor traffic in the dry states of Kansas, Oklahoma, and Mississippi.)

BY CLAYTON KIRKPATRICK
(Chicago Tribune Press Service)

Jackson, Miss., March 9—The inquirer into the workings of prohibition in Mississippi feels somewhat like a traveler stepping thru the looking glass into a topsy turvy wonderland.

He finds a state "bone-dry" since 1908 which collects nearly a million dollars a year in taxes on liquor, a state where every bootlegger is a law breaker whose identity, place of business, and gross receipts are reported to the state tax collector, and who deals directly with the state thru a deputy tax collector who stops each month to exact for the state 10 per cent of gross sales.

In addition the observer finds cities and counties where liquor is as readily available and as openly displayed as in any wet state. He is told the places are wet by "local option," altho the legislature decreed in 1908 that liquor never again could be sold, bottled, given away, manufactured, transported or possessed anywhere in the state.

Drink Wet, Vote Dry

He also finds a state where political candidates are afraid or reluctant to campaign for repeal even when running for local office in "wet" counties; where it was the dries who gave quasi-legal status to liquor by taxing it; where a majority of the people drink wet and vote dry, and have no objections to lawmakers who do the same.

Mississippi may not be such a hodge-podge of paradoxes much longer. The legislature, now in session, has bills to repeal the liquor tax before it in both house and senate. The senate measure, already passed once and then reconsidered, is expected to go to house next week and replace the house measure.

*Just like
protection
money*

*If it passes,
bootleggers
make more
profit.*

Church groups are beating the drums for strict enforcement of prohibition. In the meantime this is how it is in Mississippi:

Jackson, the capital, is a city famed the length and breadth of Mississippi for its civic virtue and sobriety. It is dry. You can't even buy a bottle from a bellhop in a hotel. That does not mean that nobody drinks in Jackson, however. There is something typically Mississippian about the way Jackson citizens drown prohibition in alcohol and have it, too.

But Across the River

The city of 62,000 is situated in Hinds county across the Pearl river from Rankin county. For as long as memory serves the Rankin county end of the Pearl river bridge has been the threshold to a happy hunting ground of whisky, gambling, and complaisant women. It is the country retreat for fast living gentry from the dives of New Orleans who are sometimes forced from their more favored haunts by the law.

This free living settlement on the muddy banks of the Pearl is called the Gold Coast. It is a 50 cent taxi ride from the heart of Jackson's Capital st. business district. It has in convenient concentration everything that Jackson lacks.

"There is no law across the Pearl," Jackson citizens say in horrified tones. "The Gold Coast is a disgrace. It should be closed down."

A Saturday Night Visit

Still when the flimsy wooden halls begin to burn [bootleggers have their own ways to keep competition in bounds] it is the Jackson fire department that thunders over into Rankin county to extinguish the flames. A local paper reported recently that the firemen had been able to save several cases of whisky when Little Red Hydrick's place burned.

We visited the Gold Coast on a Saturday night in a taxi. The driver was a pacific young man who, when he learned our intention to see all the sights, almost gave up his fare. "Friend," said he, "the Gold Coast is no place for a stranger and a Yankee to mess around. If you start snooping around you'll either be shot or stabbed, or beat up. If you want a bottle I'll take you. If you want a conducted tour, find another cab."

"Okay," we replied meekly, a little awed. "Just in and out for a bottle if that's the way it is."

"You see," said the cab driver apologetically, "I only got one lung. I'm not a fighting man. I couldn't get in the army."

*"Look at me,
I'm pure"....*

*... yeah, but
look across
the river.*

What Does "One Quart" Prohibition REALLY MEAN?

There's nothing like it anywhere . . . it's novel . . . it's unique. But it's sinister . . . it's a plan to destroy the strictly-regulated alcoholic beverage business and to turn that business over to the bootlegger.

Here's the ONE-QUART
prohibition as set forth
in Initiated Act No. 2.

SECTION 1. "The Manufacture, Sale, Bartering, Loaning or Giving Away of intoxicating liquor within the State of Arkansas for beverage purposes is hereby prohibited. The exportation from, the importation into, or the transportation within the State of Arkansas of more than one quart, at any time, of intoxicating liquor for beverage purposes is hereby prohibited. Having in possession more than one quart, at any time, of intoxicating liquor within the State of Arkansas for beverage purposes is hereby prohibited; and any such liquor found in possession of an person shall be confiscated by an order of a court of competent jurisdiction. Intoxicating liquor is hereby defined to include any beverage containing over $\frac{1}{2}$ of 1% of alcohol by weight.

Yes, The "One Quart" Prohibition Is As
Simple As A-B-C. It Means Just This:

Any man . . . any woman . . . or even a child . . . is entitled to EXPORT, IMPORT, TRANSPORT or POSSESS FOR BEVERAGE PURPOSES, one quart of beer or wine, whiskey or rum, ale or gin, vodka or moonshine. The ONE-Quart law guarantees your right to get a quart, and the right to drink a quart. The ONE-QUART law is the BOOTLEGGER'S BILL OF RIGHTS—it's his license to do business.

Initiated Act No. 2 Will Make Mockery of All Law and Order—DEFEAT IT!

**Vote AGAINST
Act No. 2**

For Initiated Act No. 2 ☐
Against Initiated Act No. 2 ☒

Defeat

Prohibition!

Act No. 2 IS PROHIBITION

VOTE AGAINST

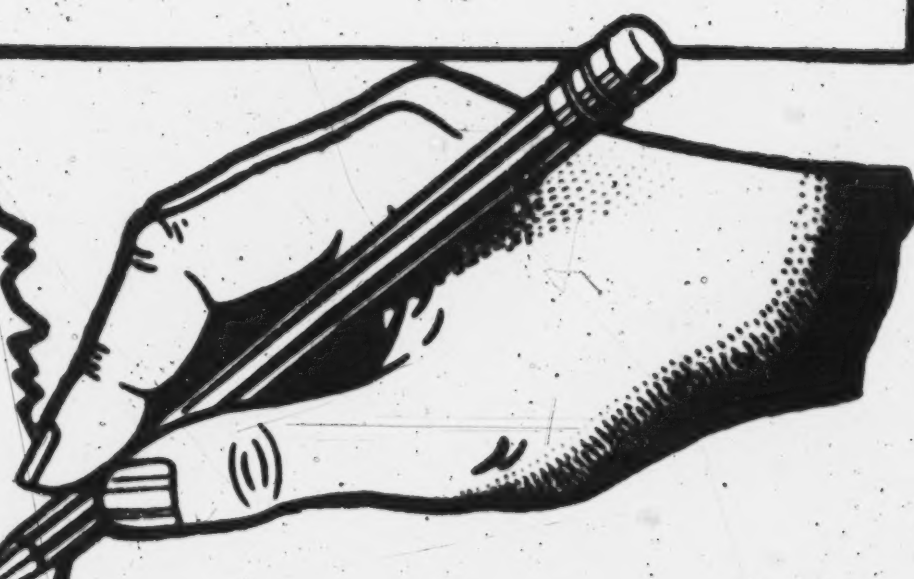
PROPOSED STATEWIDE PROHIBITION LAW

It's the Last Measure at the Bottom of the Ballot

on NOV. 7

For Initiated Act No. 2 ☐

Against Initiated Act No. 2 ☒



Defeat Prohibition!

This Political Ad Paid For By O. J. "Don" Green, Executive-Secretary ARKANSAS AGAINST PROHIBITION, Little Rock

... DOES

... PROHIBITION

Defeat Prohibition!

This Political Ad Paid For By O. J. "Don" Green, Executive-Secretary ARKANSAS AGAINST PROHIBITION, Little Rock



★ *Let "Dry" Counties remain "Dry"*

★ *Let "Wet" Counties remain "Wet"*

★ *Let Arkansas Keep \$6,000,000 Annual Revenue*

Defeat of Initiated Act No. 2 on November 7th means that Arkansas will retain its present system of permitting each county to handle alcoholic beverages as it chooses—our dry counties will remain dry, our wet counties will remain wet, and ALL counties will continue to share equally in the more than \$6,000,000 annual revenue from legal sales.

LET'S KEEP LEGAL CONTROL

AS WE NOW HAVE IT!

**Vote AGAINST
Act No. 2**

For Initiated Act No. 2 ☐

Against Initiated Act No. 2 ☒

Defeat

Prohibition!

This Political Ad Paid For By ARKANSAS AGAINST PROHIBITION, Little Rock, O. J. "Don" Greene, Executive-Secretary

UPPER LEFT: 4 Col. X 10" Advertisement
Ran October 18, 1950
In all Arkansas Daily Newspapers (30)

UPPER RIGHT: 4 Column X 10" Advertisement
Ran October 19 or 20, 1950
In all Arkansas Weekly Newspapers (141)
Ran October 23, 1950
In all Arkansas Daily Newspapers (30)

LOWER LEFT: 4 Column X 10" Advertisement
Ran October 25, 1950
In all Arkansas Daily Newspapers (30)
Ran October 26 or 27, 1950
In all Arkansas Weekly Newspapers (141)

THE PAY-OFF IN MISSISSIPPI

MISSISSIPPI'S
LIQUOR FLOOD IS
ROLLING ALONG'Dry' State Even Takes
Cut of Bootleg Profits

(This is the last of a series of articles describing the liquor traffic in the dry states of Kansas, Oklahoma, and Mississippi.)

BY CLAYTON KIRKPATRICK
(Chicago Tribune Press Service)

Jackson, Miss., March 10—Since last July 1 the federal government has sold 1,516 retail liquor dealer tax stamps in the "dry" state of Mississippi and 45 wholesale liquor dealer tax stamps. They cost \$25 each and \$100 each respectively and are good for one year. Each stamp represents one liquor dealer [bootlegger] and it must be displayed in his place of business as proof he has paid his annual federal tax.

That may be one of the reasons why Mississippi public officials assume a defensive attitude whenever they are questioned about prohibition. There are other reasons. For example:

In 1944 the legislature enacted [with only 17 dissenting votes in the house and fewer in the senate] a law which reads as follows: "That upon every person engaging or continuing within this state in the business of selling or distributing, at wholesale or retail, any tangible property, articles, or commodities whatsoever, the sale or distribution of which is prohibited by law, there is hereby levied and imposed a tax equal to 10 per cent of the gross proceeds of the selling price thereof."

Applied Only to Bootleggers

Despite its general language the law has never been imposed against anybody but bootleggers. Last year it produced a little less than a million dollars. The sum is considerable in a state with annual operating expenses of about 70 millions. The state income tax yielded a little more than seven times as much.

Mississippi politicians are beginning to see a fundamental inconsistency in prohibiting the sale of liquor by one law and imposing a tax on it by another. Gov. Fielding L. Wright (D.) has called for the repeal of the tax in the extraordinary

session of the legislature now in progress.

The connoisseur of official inconsistency in Mississippi may find this little gem intriguing: Jackson's ill-famed Gold Coast, the wide open source of most of the whisky in central Mississippi, sells no beer. The reason given is that Rankin county voters have voted it out by local option under the state law regulating sale of "nonintoxicating" beverages.

Vote Dry, Drink Wet

Sheriff Henry G. Laird was asked to comment on this. "Well," he drawled, "we voted against beer but the people want the Gold Coast wet. It's just another example of how we do things here. We vote dry and drink wet."

To complete the catalog of inconsistency which characterizes Mississippi citizens and their prohibition law, it must be pointed out that the legislature in its 1946 session rejected by large majorities four bills introduced by a few sincere dries to tighten up enforcement of the law.

One of these was an enabling act to qualify the state for federal enforcement assistance under the 1936 national liquor enforcement act. It would have enabled federal agents to seize and impound liquor stocks wherever found within the state as is being done now in Kansas. The bill was shouted down as an infringement of state's rights.

Repeal Not Favored

Another was the Kansas bill to hold possession of a federal liquor dealer tax stamp prima facie evidence of maintaining a common nuisance. The third was a bill to provide each district attorney with an investigator to collect evidence against bootleggers. The fourth was a bill to set up a 25 man enforcement squad to proceed against bootleggers under the direct authority of the governor.

If enforcement has few partisans in Mississippi, outright repeal has less. In the whole body of the Mississippi legislature this reporter found only one lawmaker willing to go on record as a critic of prohibition. There were a few more who were privately critical but officially "correct."

*Cheaper
than a
legitimate
license.*

*"Crime tax"
is less
than
income
tax.*

*Sell beer and
break the
law?
Heavens no!*

*They like
bootleggers.*

Taxes Go Elsewhere

"Liquor in untold quantities is sold to citizens of this state in Louisiana, Alabama, and Tennessee. The taxes are paid there and all we get out of it is an increasing disrespect for the law."

Gov. Wright has this to say about the prohibition law:

"I think Mississippi has a good prohibition law. It covers every angle of the liquor trade thoroly. We don't want to repeal the law. In 1934 we had a referendum and only eight of the 82 counties voted wet. Enforcement is purely a local matter. There is some graft and occasionally a sheriff is indicted for it [the sheriff of Copiah county is now under indictment for failure to enforce the law].

"I'm asking for repeal of the black market tax on liquor because it is inconsistent and many people have interpreted it as tantamount to legalizing liquor. The income from it is not vital to state finances."

Collector Likes Tax

Carl N. Craig, state tax collector for the last seven years, is the man who makes the black market tax work, and he believes in it.

"We've arranged for coöperation from all the states where liquor is exported to Mississippi," he said. "We get monthly reports showing the quantity and value of every consignment, the purchaser, the destination, the make of truck or car transporting it, the driver's name, and his route into Mississippi.

"These three filing cases," he said, "throwing them open," contain copies of every invoice. They are filed by counties in this state. We arrive at the taxable value of a man's liquor business by adding 33 1/2 per cent on all goods sold at retail and 15 per cent on all sold at wholesale. Probably the actual mark-up is higher, but we don't know. Thus when our collector calls each month on the liquor dealers, he has tangible evidence to support his tax assessment.

Good for whom?... racketeers

State and government do all right... so do law-breakers.

Tells Illinois Coöperation

"Illinois, one of the big export states, has given splendid coöperation in supplying us with reports. Liquor doesn't move anywhere without reports, you know, otherwise there'd be cheating on state and federal taxes. We send copies of the reports we have each month to the sheriffs so they'll know who is operating and how big his business is."

"The tax is really not a tax, but a penalty for engaging in an illegal business," he said in defense of the law. "It's the same as the federal income tax on winnings in poker and crap games. We've all kinds of precedents for it."

Another public official was asked about the tenderness of Mississippi juries for bootleggers. He said he couldn't be quoted, but that jury service in the state is part of the political patronage system. The sheriffs as political bosses of their counties are virtually their own jury commissioners.

Many residents of rural Mississippi gather at the county seats when Circuit courts are in session and the \$2 to \$3 a day pay of veniremen is considered equal to a vacation with pay. The special six man panels for the justice of peace courts are political favorites who make a profession of their jobs much as do coroners' jurors in Cook county.

Crooked politics and Prohibition are bedfellows.

microcard

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~118~~ 29

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, Petitioners,

v.

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No.

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, *Petitioners*,

v.

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
your petitioners, pray that a writ of certiorari issue
to review the judgment of the United States Court of
Appeals for the Ninth Circuit, entered in the above-
entitled case on July 8, 1957.

OPINIONS BELOW

The oral opinion of the district court (R. 27-30) is
not reported. The opinion of the court of appeals
(Appendix A, pp. A1-A6, *infra*) is reported at 246 F.
2d 751.

JURISDICTION

The judgment of the court of appeals (Appendix B, p. A7, *infra*) was entered on July 8, 1957. A timely petition for rehearing and for rehearing en banc was denied on October 15, 1957 (Appendix C, p. A8, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where taxpayers make payments to a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure would have destroyed the taxpayers' business, the Commissioner of Internal Revenue may by regulation disallow such payments as business expenses in the face of a statute permitting deductions of "All ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

2. Whether a regulation forbidding deduction of expenditures for "the promotion or defeat of legislation" may properly be construed and applied to bar deduction of expenditures made to defeat an initiative measure submitted to the people at large.

3. Whether, where the uncontroverted evidence, as well as facts within judicial notice, show that an initiative measure aimed at closing all privately-owned establishments selling beer and wine at retail would destroy 90% of all wholesale businesses in those commodities, it was open to the district court to find (or for the court of appeals to base its additional affirmance on the ground) that it was not shown that the forced closing of retail stores would affect wholesale business.

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISION INVOLVED

The statute, regulation, and state constitutional provision involved are set forth in Appendix D, pp. A9-A12, *infra*.

STATEMENT

Petitioners, husband and wife (Fdg. 1, R. 44), owned a one-fourth interest in a partnership carrying on wholesale distribution of beer under the trade name of "Cammarano Brothers" in Tacoma, Washington (Fdg. 4, R. 45).

At the Washington State general election held on November 2, 1948, an initiative measure was submitted to the people in accordance with Amendment 7 to the Constitution of the State of Washington (Appendix D, pp. A11-A12, *infra*). That Initiative to the Legislative, No. 13, would have placed the retail sale of wine and beer exclusively in state-owned and operated stores.

The ballot title of Initiative No. 13 provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties." (Fdg. 6, R. 45.)¹

¹ The ballot title, under Washington law, was formulated by the Attorney General of the State. Wash. Rev. Code, §§ 29.79.040, 29.79.060. The full text of the initiative measure appears at R. 93-96. Under Washington law, arguments for and against an initiative measure are, after formulation by its proponents and opponents, distributed by the Secretary of State at public expenses. See Wash. Rev. Code, §§ 29.79.340 to 29.79.430. The text of the arguments for and against Initiative No. 13 are set forth at R. 96-101.

The measure had previously, in 1947, been submitted to the state legislature, which did not act upon it (Fdg. 7, R. 45-46). Thereupon the Initiative was submitted to the people in 1948, in which year the legislature was not in session (Pretrial order, ¶ 6, R. 22).

Petitioners were members of the Washington Beer Wholesalers Association, Inc. (Fdg. 5, R. 45), a non-profit trade association exempt from federal income tax (Fdg. 10, R. 47; Pretrial order, ¶ 6, R. 22). This Association in December 1947 established the Washington Beer Wholesalers Association, Inc. Trust Fund, to help finance an extensive statewide publicity program, on the part of wholesale and retail beer and wine dealers, which urged the defeat of Initiative No. 13 (Fdgs. 5-6, R. 45).

Payments to the Trust Fund were made by the Association's members on the basis of the volume of business of each wholesaler (Fdg. 8, R. 46). During 1948, the partnership of Cammarano Brothers paid \$3,545.15 to the Trust Fund, of which petitioners' proportionate share was \$886.29 (Fdg. 5, R. 46).

The Trust Fund was expended in furtherance of the publicity program against Initiative No. 13 (R. 114-116), which was carried out by various types of advertising—newspaper, radio, direct mail, billboards, street-car cards (R. 115-116)—none of which had reference to the wares or members of the Association as such (Fdg. 8, R. 46).

Initiative No. 13 was defeated (Fdg. 9, R. 46).

In filing their joint federal income tax return for the year 1948, petitioners deducted as a business expense under Sec. 23(a)(1)(A) of the Internal Revenue Code

of 1939 as amended (Appendix D, p. A9, *infra*), their proportionate part of the payment made by the partnership to the Trust Fund in the campaign against Initiative No. 13 (Cmplt., ¶ V, R. 4; Exh. A. to Cmplt., R. 11-12; Ans., ¶¶ 5, 7, R. 13-14, 14-15).

The Commissioner disallowed the expenditures in question on the ground that Treas. Reg. 111, Sec. 29.23 (o)—1 (Appendix D, pp. A9-A11, *infra*) barred deductions of "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda" (Cmplt., ¶ VI at R. 5-6; Ans., ¶ 6, R. 14; Pretrial Order, ¶ 5, R. 22), and assessed an additional tax against petitioners, of which the sum of \$153.98 was attributable to such disallowance (Pretrial Order, ¶ 5 at R. 22).

After payment under protest of the additional tax assessed, and failure of the Commissioner to act upon petitioners' timely claim for refund, they brought the present action for the recovery of the tax so paid under protest (Fdg. 3, R. 44).

On the day of the trial, the Government filed a trial memorandum with the district court which stated, *inter alia* (R. 18), "Concededly, Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely." Government counsel in his opening statement sought to qualify or withdraw this concession (R. 73-74).

The only evidence on the point was offered by Adwen, Secretary of the Washington Beer Wholesalers Association (R. 75), who testified (R. 76-77):

"A. Initiative 13 primarily would have in the opinion of the industry—I think I can safely say industry—would have made it necessary to dis-

tribute beer and wine through state liquor stores which would have automatically put the taverns and the grocery stores handling beer and wine out of business. At the same time it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business. I don't say a 100 per cent for this reason. It would still probably be necessary for some of the breweries to have representatives to call upon the Liquor Board to sell their merchandise and their wares, but at least 90 per cent of them would have had nothing to do so they would have gone completely out of business."

Although this was the only evidence on the point, the trial court found as a fact that (Fdg. 9, R. 46):

"There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear."

The district judge, both in his oral opinion rendered at the close of the trial (R. 27-30) and in his formal conclusions of law filed four months later (R. 47-48), held for the Government on the ground that the regulation relied upon was valid and that there was no distinction between efforts to influence legislation that were addressed to the legislature and efforts directly addressed to the people in connection with an initiative measure.

After judgment for the defendant (R. 49-50), petitioners appealed to the court below (R. 51). That court held (Appendix A, pp. A1-A6, *infra*) that the regulation disallowing the expenditure was proper, and affirmed; and rested its affirmance on the addi-

tional ground (p. A6, *infra*) that, in view of Finding 9, quoted above, petitioners failed to establish "that passage of the initiative would have impaired its business as a beer distributor." A timely petition for rehearing was denied (Appendix C, p. A8, *infra*).

REASONS FOR GRANTING THE WRIT

The basic question presented is whether expenditures made by individual taxpayers to preserve their business from destruction, expenditures that on their face are ordinary and necessary business expenses, can be disallowed under cover of a regulation which, as here applied, is plainly at variance with the governing statute.

That basic question depends, in the present case, on whether a regulation disallowing expenditures incurred in lobbying or in attempting to defeat legislation in the ordinary sense of that word, i.e., enactments of representative bodies, may properly be construed to apply to expenditures made in connection with an initiative measure submitted directly to the voters at large, whose enactment or defeat is not dependent on any action by a legislative body.

First. Under a long line of cases, here and elsewhere, it is settled that a taxpayer may deduct, as an ordinary and necessary business expense within the meaning of those words in Sec. 23(a)(1)(A), sums expended by him to preserve his business or occupation from destruction. Thus, a mail order dentist threatened with a postal fraud order has the right to deduct expenses incurred in defending the postal proceedings (*Commissioner v. Heininger*, 320 U.S. 467); an officer facing a court-martial and the consequent risk of dismissal from the service may deduct counsel fees in-

curred in defending against the charges, since, of course, his business is that of being an officer (*Lindsay C. Howard*, 16 T.C. 157, affirmed on another issue, 202 F. 2d 28 (C.A. 9)); and a motion picture scenario writer, summoned to appear before a Congressional committee and facing possible blacklisting by the industry, may deduct the sums paid counsel for representing him with a view to preventing his loss of livelihood (*Waldo Salt*, 18 T.C. 182). On this principle, the deduction here should have been allowed. As Judge Minton said in the *Heininger* case below (*Heininger v. Commissioner of Internal Revenue*, 133 F. 2d 567, 570 (C.A. 7)), quoted with approval in *Lilly v. Commissioner*, 343 U.S. 90, 94, note 4,

“Without this expense, there would have been no business. Without the business, there would have been no income. Without the income there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary.”

That being so, any regulation which attempts to disallow the deduction plainly granted by the statute is necessarily invalid. E.g., *Bingham's Trust v. Commissioner*, 325 U.S. 365, 377, and cases there cited.

2. Passing for the moment the distinction between lobbying in legislative halls, with all its sordid connotations of insidious influences, and attempts such as the one here involved, “to saturate the thinking of the community” (*United States v. Rumely*, 345 U.S. 41, 47)—a vital difference which is fully discussed immediately below—it is significant that petitioners’ expenses were incurred to save their existing business from destruction and not merely in an attempt to create a new business in the future. The latter may be assumed

to be non-deductible by analogy to the rule of *McDonald v. Commissioner*, 323 U.S. 57, 60—"his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years." It is on that basis that most instances of expenses incurred in direct appeals to the electorate in the endeavor to legalize a future business presently illegal have been disallowed. E.g., *Mrs. William P. Kyne*, 35 B.T.A. 202 (horse racing); cf. *Mays v. Bowers*, 201 F. 2d 401 (C.A. 4) (to be elected a city councilman); cf. *Old Mission P. Cement Co. v. Commissioner of Int. Rev.*, 69 F. 2d 676 (C.A. 9), affirmed on other issues, 293 U.S. 289 (effect of referendum measure on business held too remote). But petitioners here did not appeal to the voters to gain office prospectively or to be permitted to engage in a business then unlawful; they made expenditures in an ultimately successful effort to preserve from certain destruction an existing business then and now entirely lawful.

3. The basic distinction here is between lobbying, i.e., the exertion of pressures and persuasion on individual legislators, the attempt "to spread * * * insidious influences through legislative halls" that is within the condemnation of *Textile Mills Corp. v. Commissioner*, 314 U.S. 326, 338, and the wholly different effort "to saturate the thinking of the community" (*United States v. Rumely*, 345 U.S. 41, 47), which is an activity directed at the entire body politic.

Not only has this Court indicated that the *Textile Mills* case rests on the limited concept of lobbying, because that activity tends to frustrate settled public policies (see *Lilly v. Commissioner*, 343 U.S. 90, 95; *Commissioner v. Heininger*, 320 U.S. 467, 473), but the Commissioner of Internal Revenue himself, three

years after the *Textile Mills* decision, acquiesced in a Tax Court ruling which turned on the distinction between influence directed at legislators and publicity addressed to the entire electorate.

In *Luther Ely Smith*, 3 T.C. 696, the question concerned the right of the taxpayer, a trial lawyer, to deduct as an ordinary and necessary business expense a contribution made to an organization formed to amend the Constitution of Missouri by providing that candidates for judicial office should be nominated by a commission. The taxpayer established that his trial practice had suffered under the existing method of selecting judges because his clients had lost confidence in the courts. The contribution was expended for publicity in support of the amendment in the form of speeches, literature, and radio broadcasts. The amendment was adopted, and, being self-operative, became law forthwith.

In allowing the deduction, the Tax Court rested its conclusion on the basis that no lobbying was involved because the people themselves acted. It said (3 T.C. at 702):

"It should be noted that the institute engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the constitution proposed by the initiative of the people, voted upon at a general election, and becoming self-operative thirty days thereafter, without the necessity of any action or approval by either the legislature or the governor."

The Commissioner acquiesced, 1944 Cum. Bull. 26 and his acquiescence has never been withdrawn. We think there can be no sound distinction between a cam-

paign directed at the voters generally in respect of a constitutional amendment that takes effect without action of the legislature, and an initiative measure that similarly takes effect. Both are equally direct legislation enacted by the people in the exercise of their underlying sovereignty.

4. The view of both courts in this case, in substance that "legislation is legislation" (R. 29; Appendix A, pp. A3-A5, *infra*), not only disregards the evils inherent in lobbying, but overlooks completely an important and highly significant phase of American political development which had its origin in popular distrust of legislative bodies, and which sought the solution in a restoration of the people's sovereignty in the form of direct legislation by the people effectuated through the initiative and referendum. Amendment 7 to the Washington Constitution (Appendix D, *infra*, pp. A11-A12) was adopted in 1912, when the drive for such direct legislation was at its height. See, e.g., *The Initiative, Referendum, and Recall* (43 Annals of the American Academy, No. 132);² Theodore Roosevelt, *A Charter of Democracy* [Columbus, Ohio, speech, Feb. 21, 1912], Sen. Doc. 348, 62d cong., 2d sess., pp. 11-12;³ Eaton,

² "Briefly summarized, the functions of the initiative and referendum are: To restore the sovereignty of the people. To educate and develop the people. To secure legislation for the general welfare. To prevent legislation against the general welfare. To eliminate the legislative blackmailer. To make our legislative bodies truly representative." Sen. Bourne of Oregon, *Functions of the Initiative, Referendum, and Recall*, *id.* at 3.

³ "We hold it a prime duty of the people to free our Government from the control of money in politics. For this purpose we advocate not as ends in themselves, but as weapons in the hands of the people, all governmental devices which would make the representatives of the people more easily and certainly responsible to the people's will." *Id.*, p. 3.

The Oregon System (1912); Beard and Schultz, *Documents on the State-Wide Initiative, Referendum and Recall* (1912); cf. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118.

To hold, as did the courts below, that activities directed at legislation pending in legislative halls—the process of lobbying—are to be assimilated to activities directed at a measure presented to the people at large under initiative provisions adopted in the conscious effort to free the people from the frailties of their representatives, precludes the attainment of the very objectives of the initiative. And to hold that sums expended to oppose an initiative measure, which would have destroyed petitioners' business, are not ordinary and necessary business expenses, is to do violence not only to the language of the governing statute but also to "the ways of conduct and the forms of speech prevailing in the business world." *Commissioner v. Heininger*; 320 U.S. 467, 472.

Second. The view of the court below (Appendix A, p. A5, *infra*), that there has been Congressional reenactment of the regulation in question, will not survive examination.

To begin with, as this Court has frequently recognized, the doctrine of reenactment is a weak and unreliable reed on which to rest statutory interpretation. E.g., *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431; *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-534; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757, 759. But as applied to the present case, that doctrine is even weaker, to the point of disappearance.

For it requires, as a prerequisite, "regulations and interpretations long continued without substantial

change" (*Helvering v. Winmill*, 305 U.S. 79, 83), a condition that is lacking here. At best, all that can be shown is a regulation aimed at lobbying, at the influencing of legislation in its usual sense, i.e., enactments of representative bodies, a regulation which in its inception was aimed at expenditures by corporations and by corporations alone. See *Textile Mills Corp. v. Commissioner*, 314 U.S. 326, 337-338. There has never been any regulation specifically mentioning efforts to influence initiative measures submitted directly to the people. And, far from there being "interpretations long continued without substantial change" holding that "legislation" in the regulation includes measures enacted by direct vote of the people, the Commissioner acquiesced in the holding (*Luther Ely Smith*, 3 T.C. 696) that a taxpayer may deduct as a business expense expenditures incurred to adopt a constitutional amendment—direct legislation by the people—which he believed would increase his business.

Only two rulings have been found where it was held that expenses incurred in connection with a referendum for the continuance or non-continuance of a business dependent on periodic popular approval were non-deductible. *Revere Racing Association v. Scanlon*, 232 F. 2d 816 (C.A. 1, 1956) (dog racing); *Herbert Davis*, 26 T.C. 49 (1956) (liquor business). But in view of this Court's observation (*Jones v. Liberty Glass Co.*, 332 U.S. 524, 534)—"We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation"—those rulings are plainly insufficient to permit invocation of the doctrine of reenactment, the more so since both followed by many years the basic statute on which petitioners here rest their case.

Any talk of "reenactment" in the present connection, therefore, must be dismissed as sheerest fiction.

Third. The alternative ground of affirmance espoused by the court below (Appendix A, p. A6, *infra*), to the effect that petitioners failed to prove that the passage of the initiative measure here in question would have impaired their business, is similarly untenable.

The only evidence on the effect of the initiative was that of the witness Adwen (R. 76-77), as follows:

"* * * it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business.
* * * at least 90 per cent of them would have had nothing to do so they would have gone completely out of business."

A wholesaler sells to retailers. He can lose his business in one of two ways, either by having his own establishment closed or by having his customers' establishments closed. Either act effectively terminates his business. Plainly, when retail stores are closed, wholesalers have lost their trade for want of customers, and in this instance, 90% of the wholesalers would have had nothing to do. (No point is made, quite properly, that these petitioners did not undertake to demonstrate to a mathematical certainty that they would have come within the 90%.)

All the above is a part of "the general customs and usages of merchants" (*Brown v. Piper*, 91 U.S. 37, 42) and thus comes easily within the realm of judicial notice; and all the above is certainly as obvious as the fact that a freezer which makes ice cream is adapted to freeze fish (*Brown v. Piper*, *supra*). Indeed, the alternative holding of the court below fairly supports Ben-

tham's apothegm that jurisprudence is the art of being methodically ignorant of what everyone knows.⁴

Fourth. The present problem is a recurring one, and will continue to arise; Section 162(a) of the Internal Revenue Code of 1954⁵ is the same as Section 23(a) (1)(A) of the 1939 Code, here involved. The present problem is important, for obvious reasons, since it poses sharply the question whether the taint of lobbying may properly be applied to what are after all petitions to the people themselves.

The English House of Lords, a tribunal not unmindful either of the demands of the fisc nor of considerations of public morality, has held that a corporation resisting nationalization and campaigning against such a course on the part of Parliament may deduct expenditures incurred in that behalf as "disbursements or expenses * * * wholly and exclusively laid out or expended

⁴ Finding 9 of the trial court (R. 46), which was relied on to support the alternative holding below (p. A6; *infra*), is also deficient on technical grounds: (a) In view of the Adwen testimony, that finding is "clearly erroneous" within Rule 52(b), F. R. Civ. P., under the standard of *United States v. United States Gypsum Co.*, 333 U.S. 364, 395. (b) The judicial admission in the Government's trial memorandum (R. 18), that "Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely," cannot be fudged (R. 73-74) in the absence of a showing that it could not in any circumstances be true. See *L. P. Larson, Jr., Co. v. Wm. Wrigley Jr., Co.*, 253 Fed. 914, 917-918 (C. A. 7), certiorari denied, 248 U.S. 580; *Oscanyan v. Arms Co.*, 103 U.S. 261, 263-264; 9 Wigmore, *Evidence* (3d ed. 1940) §§ 2588, 2590, 2591. No such showing, it need hardly be said, can be made.

⁵ The text of the 1954 provision is as follows:

"§ 162. Trade or business expenses

"(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—* * *"

for the purposes of the trade." *Morgan v. Tate & Lyle, Ltd.*, [1955] A. C. 21, affirming [1953] Ch. 601.*

We submit that review by this Court should be had before individual taxpayers are forbidden, on the footing of the now discredited notion (*United States v. Rumely*, 345 U.S. 41) that there is no difference between lobbying aimed at individual legislators and an appeal directed to the people at large, to deduct as business expenses the cost of saving their business from extinction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JANUARY, 1958

* If it be objected that the cited case did not involve any regulation against lobbying as this one does, the answer is that petitioners rely on substantially similar statutory language and urge that it could not be varied by the regulation here put forward by the Government.

APPENDIX A
OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,350

July 8, 1957

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, His Wife,
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

Before: ORE, POPE, and FEE, Circuit Judges

ORE, Circuit Judge:

Appellants, partners in a wholesale beer distributing concern in Tacoma, Washington, made a contribution to the Washington Beer Wholesalers Association, Inc., Trust Fund. The Trust Fund had been established December 17, 1947, to carry on an extensive state-wide publicity program, directed by an Industry Advisory Committee, on behalf of wholesale and retail beer and wine dealers to defeat proposed initiative legislation in the State of Washington. The measure, if enacted into law, would have placed the retail sale of wine and beer exclusively in state owned and operated stores.¹

¹ The ballot title of the Initiative provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all pro-

The Association assessed its members amounts based upon their volume of business. The funds received from the contributions, appellants' contribution included, were used in an effort to defeat the initiative legislation.

On their income tax returns appellants claimed a deduction for the contribution made as an ordinary and necessary business expense within the meaning of § 23(a)(1)(A), Internal Revenue Code of 1939.² The Commissioner of Internal Revenue disallowed this deduction on the ground that the contribution was used for lobbying purposes and the promotion or defeat of legislation, and therefore within the prohibition contained in Treasury Regulations 111, § 29.23 (o)-1, in force and effect at the time the payment was made. Following payment of the assessed deficiency and a claim for refund, this suit for refund followed.

The regulation reads:

Sec. 29.23(o)-1. *Contributions or Gifts by Individuals.*—

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

visions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties.”

²Sec. 23. DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, • • • •

The field encompassing the force and effect of the lobbying regulation set out above has often been plowed; but there exists no straight furrow which leads unerringly to the proper solution of all cases. The regulation has quite often been held to preclude deductions made for moneys spent to defeat legislation.³ Of course, the particular facts of each case govern.

Unquestionably the regulation is broad enough to exclude deductions for any and all sums spent for lobbying and the promotion or defeat of legislation, and the Government insists that the courts have sustained the validity of the regulation in that broad sense. The case of *Textile Mills Corp. v. Commissioner*, 1941, 314 U.S. 326, is relied on by the Government.⁴ It is argued by appellants, with some force, that *Textile Mills*, as an authority, should be restricted to the facts of that particular case, and that the ban against deductions of amounts spent for lobbying as ordinary and necessary expenses is valid only where they arise "from that family of contracts to which the law has given no sanction." 314 U.S. at 339. However, other language in *Textile Mills* characterizes the words "ordinary and neces-

³ See *Textile Mills Corp. v. Commissioner*, 1941, 314 U.S. 326; *Sunset Scavenger Co. v. Commissioner*, 9 Cir., 1936, 84 F.2d 453; *Revere Racing Assn. v. Scanlon*, 1st Cir., 1956, 232 F.2d 816; *American Hardware & Eq. Co. v. Commissioner*, 4 Cir., 1953, 202 F.2d 126, cert. denied 346 U.S. 814 (1953); *Roberts Dairy v. Commissioner*, 8 Cir., 1952, 195 F.2d 948, cert. denied, 344 U.S. 865 (1952).

⁴ In *Textile Mills*, the Supreme Court held that the expenses of lobbying and propaganda, paid by a corporation employed by certain German textile interests to secure legislation from Congress authorizing the recovery of German properties seized during the First World War, were not deductible. The Court there related the lobbying regulation to ordinary and necessary business expenses, and rejected the contention that the limitation was not applicable to such expenses because it was included as a regulation under § 23(n), Internal Revenue Code of 1939, but was not specifically included as a regulation under § 23(a) of the Act.

sary" as used in the statute, as not being "so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation." 314 U.S. at 338. We think it may reasonably be gathered from a reading of *Textile Mills* that the Commissioner, in segregating sums paid for lobbying as non-deductible as ordinary and necessary business expenses, acted within the proper exercise of his rule-making power.

This court in the case of *Sunset Scavenger Co. v. Commissioner*, 9 Cir., 1936, 84 F.2d 455, decided prior to *Textile Mills*, held that an association of scavengers in San Francisco could not deduct expenses incurred in combatting an ordinance which would have seriously affected their business. In its decision this court relied on the doctrine of statutory re-enactment in the face of a known administrative interpretation to sustain the lobbying regulation, as well as the latent ambiguity of the phrase, "ordinary and necessary business expenses."

In *American Hardware v. Commissioner*, 4 Cir., 1953, 202 F.2d 126, cert. denied, 346 U.S. 814 (1953), the regulation was applied to disallow deductions for payments by a hardware company to the National Tax Equality Association, which issued propaganda on the subject of tax revision. The court there held that *Textile Mills* controlled, rejecting contentions that *Textile Mills* was limited to the non-deductibility of items which are against public policy or are morally wrong, and that the lobbying regulation was inapplicable to ordinary business expenses since not specifically appended to § 23(a).

In *Revere Racing Association v. Scanlon*, 1 Cir., 1956, 232 F.2d 816, the regulation was again applied to disallow payments by a dog racing company for the defeat of a public referendum on the question of whether pari-mutuel system of betting at dog races would be continued in the county. There, the court rejected the contention that the regulation was inapplicable where the measure was before the people upon referendum, rather than before a legislature.

Appellants cite *Commissioner v. Heininger*, 1943, 320 U.S. 467, and *Lilly v. Commissioner*, 1952, 343 U.S. 90, both decided subsequent to *Textile Mills*, as limiting the scope of *Textile Mills* to payments violating public policy.

In *Commissioner v. Heininger*, a mail order dentist was allowed a deduction as ordinary and necessary business expenses for legal fees incurred in an unsuccessful contest of a fraud charge lodged by the Postmaster. In *Lilly v. Commissioner*, an optician was allowed business expense deductions for kick-backs to a prescribing physician, where the practice was customary.

Those cases are distinguishable in that the regulation here involved was not applicable; there was no lobbying involved. In *Lilly v. Commissioner*, the Supreme Court expressly distinguishes *Textile Mills* on the ground that in the earlier case an interpretative regulation had been in effect for many years with Congressional acquiescence. 343 U.S. at 95.

This court in *Sunset Scavenger v. Commissioner*, 9 Cir., 1936, 84 F.2d 453, held that the doctrine of statutory re-enactment in the face of a known administrative interpretation applied in that case. We think that doctrine can be said to apply with equal force in the instant case.⁵ What

⁵ The lobbying regulation assumed its present form in Article 562 of Treasury Regulations 45 (1919 ed.), promulgated under the Revenue Act of 1918, and has since appeared without change, in all successive Regulations. See Article 562 of Treasury Regulations 45 (1920 ed.), 62, 65 and 69, promulgated under the Revenue Acts of 1918, 1921, 1924, and 1926, Article 262 of Treasury Regulations 74 and 77 (1929 and 1937 eds.), promulgated under the Revenue Acts of 1928 and 1932, Article 23(o)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 23(q)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 23(o)-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, Sections 19.23(o)-1, 29.23(o)-1, and 39.23(o)-1 of Treasury Regulations 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939, and Section 1.162-15 of the proposed Income Tax Regulations under the Internal Revenue Code of 1954.

we have said sustains an affirmance of the judgment, but there is also another reason which also requires an affirmance. The trial court found that:

"9. There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear. In any event, the measure was defeated."

This is a finding that appellants failed to sustain the burden of establishing by a preponderance of the evidence that the passage of the initiative would have impaired its business as a beer distributor.

Judgment Affirmed.

(Endorsed:) Opinion. Filed July 8, 1957.

PAUL P. O'BRIEN, Clerk.

APPENDIX B

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,350.

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, His Wife,
Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Judgment

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: July 8, 1957

PAUL P. O'BRIEN, *Clerk.*

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, October 15, 1957

Before: ORR, POPE and FEE, *Circuit Judges*

**Order Denying Petition for Rehearing and Petition for
Rehearing En Banc**

On consideration thereof, and by direction of the Court,
It Is ORDERED that the petition of Appellants, filed August
27, 1957, and within time allowed therefor by rule of Court
and valid extension thereof, for a rehearing and rehearing
en banc, be, and each of them hereby is denied.

APPENDIX D

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 provides in pertinent part as follows:

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or Business Expenses.

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

2. Section 29.23(o)-1 of Treasury Regulations 111, as it existed during 1948, was as follows:

"Sec. 29-23(o)-1. Contributions or gifts by individuals.—

"A deduction is allowable under section 23(o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A deduction is not allowable, however, for the actual payment of a contribution or gift if the amount of such payment already has been deducted on the accrual basis in computing net income for any taxable year beginning before January 1, 1938. A contribution or gift to an organization described in section 23(o) is deductible even though some portion of the funds of such organization is or may be in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162). For computation of deductions for charitable contributions where the taxpayer also has an allowable deduction for medical expenses, see section 29.23(x)-1.

"A contribution or gift to the United States; any State, Territory, or any political subdivision thereof, or the District of Columbia, or any possession of the United States exclusively for public purposes, is deductible.

"No reduction is allowed in computing the net income of a common trust fund or a partnership for contributions or gifts made to organizations described in section 23(o). (See sections 169 and 183.) However, a partner's proportionate share of contributions or gifts actually paid by a partnership during its taxable year to such organizations may be allowed as a deduction in his individual personal return for his taxable year with or within which the taxable year of the partnership ends, to an amount which, when added to the amount of contributions made by the partner individually and claimed as a deduction, is not in excess of 15 percent of his adjusted gross income or, for taxable years beginning prior to January 1, 1944, 15 percent of his net income computed without the benefit of the deduction for contributions. In the case of a nonresident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213(c) and 251. For contributions or gifts by corporations, see section 29.23(q)-1.

"In the case of husband and wife making a joint return, the deduction for contributions or gifts is the aggregate of such contributions or gifts made by the spouses, and is limited to 15 percent of the aggregate adjusted gross income of the spouses or, for taxable years beginning prior to January 1, 1944, 15 percent of the aggregate net income of the spouses computed without the benefit of the deductions for contributions.

"A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

"Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

"If the contribution or gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the contribution or gift.

"In connection with claims for deductions under section 23(o), there shall be stated in returns of income the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift in each case. Claims for deductions under section 23(o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary."

3. Amendment 7 to the Constitution of the State of Washington, adopted in November 1912, provides in pertinent part as follows:

"Art. 2 § 1 **LEGISLATIVE POWERS, WHERE VESTED.** The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

"(a) Initiative: The first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters

shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measure shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case, the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law."

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FILED

AUG 22 1958

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 29

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, His
Wife, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The oral opinion of the district court (R. 27-30) is not reported. The opinion of the court of appeals (R. 134-139) is reported at 246 F. 2d 751.

JURISDICTION

The judgment of the court of appeals (R. 139) was entered on July 8, 1957. A timely petition for rehearing and for rehearing *en banc* was denied on October

15, 1957 (R. 140). The petition for certiorari was filed on January 9, 1958, and granted on March 3, 1958 (R. 140). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where taxpayers make payments to a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure would have destroyed the taxpayers' business, the Commissioner of Internal Revenue may by regulation disallow such payments as business expenses in the face of a statute permitting deductions of "All ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

2. Whether a regulation forbidding deduction of expenditures for "the promotion or defeat of legislation" may properly be construed and applied to bar deduction of expenditures made to defeat an initiative measure submitted to the people at large.

3. Whether, where the uncontroverted evidence, as well as facts within judicial notice, show that an initiative measure aimed at closing all privately-owned establishments selling beer and wine at retail would destroy 90% of all wholesale businesses in those commodities, it was open to the district court to find (or for the court of appeals to base its additional affirmance on the ground) that it was not shown that the forced closing of retail stores would affect wholesale business.

STATUTES, REGULATION, AND STATE CONSTITUTIONAL PROVISION INVOLVED

The statutes, regulation, and state constitutional provision involved are set forth in the Appendix, *infra*, pp. 67-70.

STATEMENT

The present proceeding is an action brought to recover income taxes for the year 1948 that the petitioners had paid under protest.

Petitioners, husband and wife (Fdg. 1, R. 44), owned a one-fourth interest in a partnership carrying on wholesale distribution of beer under the trade name of "Cammarano Brothers" in Tacoma, Washington (Fdg. 4, R. 45).

At the Washington State general election held on November 2, 1948, an initiative measure was submitted to the people in accordance with Amendment 7 to the Constitution of the State of Washington (*infra*, pp. 69-70). That Initiative to the Legislature, No. 13, would have placed the retail sale of wine and beer exclusively in state-owned and operated stores.

The ballot title of Initiative No. 13 provided:

"An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties." (Fdg. 6, R. 45)¹

¹ The ballot title, under Washington law, was formulated by the Attorney General of the State. Wash. Rev. Code, §§ 29.79.040, 29.79.060. The full text of the initiative measure appears at R. 93-96. Under Washington law, arguments for and against an

The measure had previously, in 1947, been submitted to the state legislature, which did not act upon it (Fdg. 7, R. 45-46). Subsequently the Initiative was submitted to the people in 1948, in which year the legislature was not in session (Pretrial order, ¶7, R. 22-23).

Petitioners were members of the Washington Beer Wholesalers Association, Inc. (Fdg. 5, R. 45), a non-profit trade association exempt from federal income tax (Fdg. 10, R. 47; Pretrial order, ¶6, R. 22; Pl. Ex. 4, R. 149-150).² This Association in December 1947 established the Washington Beer Wholesalers Association, Inc., Trust Fund, to help finance an extensive statewide publicity program, on the part of wholesale and retail beer and wine dealers, which urged the defeat of Initiative No. 13 (Fdgs. 5-6, R. 45).³

Payments to the Trust Fund were made by the Association's members on the basis of the volume of business of each wholesaler (Fdg. 8, R. 46). During 1948, the partnership of Cammarano Brothers paid \$3,545.15 to the Trust Fund, of which petitioners' proportionate share was \$886.29 (Fdg. 5, R. 46).

initiative measure are, after formulation by its proponents and opponents, distributed by the Secretary of State at public expense. See Wash. Rev. Code, §§ 29.79.340 to 29.79.430. The text of the arguments for and against Initiative No. 13 are set forth at R. 96-101.

² The Association's Articles of Incorporation appear at R. 141-148.

³ In 1947, while the measure had been pending in the state legislature, an officer of the Beer Wholesalers Association had kept close track of its progress, personally contacted many of the legislators, and urged its defeat (Fdg. 7, R. 45-46). Any expenditures made in that connection by the Beer Wholesalers Association are not in issue in the present proceeding.

The Trust Fund was expended in furtherance of the publicity program against Initiative No. 13 (R. 114-116), which was carried out by various types of advertising—newspaper, radio, direct mail, billboards, streetcar cards (R. 115-116)—none of which had reference to the wares or members of the Association as such (Fdg. 8, R. 46).⁴

Initiative No. 13 was defeated (Fdg. 9, R. 46).

In filing their joint federal income tax return for the year 1948, petitioners deducted as a business expense under Sec. 23(a)(1)(A) of the Internal Revenue Code of 1939 as amended (*infra*, page 67); their proportionate part of the payment made by the partnership to the Trust Fund in the campaign against Initiative No. 13 (Cmplt., ¶ V, R. 4; Exh. A to Cmplt., R. 11-12; Ans. ¶¶ 5, 7, R. 13-14, 14-15).

The Commissioner disallowed the expenditures in question on the ground that Treas. Reg. 111, Sec. 29.23(o)-1 (*infra*, pp. 67-69) barred deductions of "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda" (Cmplt., ¶ VI at R. 5-6; Ans., ¶ 6, R. 14; Pretrial order, ¶ 5, R. 22), and assessed an additional tax against petitioners, of which the sum of \$153.98 was attributable to such disallowance (Pretrial order, ¶ 5, at R. 22).

After payment under protest of the additional tax assessed, and failure of the Commissioner to act upon

⁴ Examples of the advertising campaign against Initiative No. 13 in daily and weekly newspapers were contained in Pl. Ex. 7 (R. 151-182). That exhibit was not included in the printed record in the court of appeals, but was designated by the Government for printing here after certiorari was granted.

petitioners' timely claim for refund, they brought the present action for the recovery of the tax so paid under protest (Fdg. 3, R. 44).

On the day of the trial, the Government filed a trial memorandum with the district court which stated, *inter alia* (R. 18), "Concededly, Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely." Government counsel in his opening statement sought to qualify or withdraw this concession (R. 73-74).

The only oral testimony on the point was offered by Adwen, Secretary of the Washington Beer Wholesalers Association (R. 75), who testified (R. 76-77):

"A. Initiative 13 primarily would have in the opinion of the industry—I think I can safely say industry—would have made it necessary to distribute beer and wine through state liquor stores which would have automatically put the taverns and grocery stores handling beer and wine out of business. At the same time it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business. I don't say a 100 per cent for this reason. It would still probably be necessary for some of the breweries to have representatives to call upon the Liquor Board to sell their merchandise and their wares, but at least 90 per cent of them would have had nothing to do so they would have gone completely out of business."

Under the terms of Initiative No. 13 (R. 93-96), the State of Washington was granted a monopoly of the retail sale of beer; all laws pertaining to the licensing of the retail sale of beer were repealed; and all existing retail licenses for the sale of beer were revoked.

Notwithstanding all of the foregoing, the trial court found as a fact that (Fdg. 9, R. 46):

"There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear."

The district judge, both in his oral opinion rendered at the close of the trial (R. 27-30) and in his formal conclusions of law filed four months later (P. 37-48), held for the Government on the ground that the regulation relied upon was valid and that there was no distinction between efforts to influence legislation that were addressed to the legislature and efforts directly addressed to the people in connection with an initiative measure.

He specifically held, however, that the expenditures made by petitioners were perfectly proper, saying orally (R. 29):

"* * * This is not to indicate that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for having spent the money to defeat the legislation by fair publicity. They had a

right to do that and propriety of expenditures therefor is not in question. * * *

Later he formally found as a fact (Fdg. 11, R. 47) that:

“* * * There was nothing wrong or evil or corrupt about spending money for this purpose. Expenditures to enlighten and inform the public with respect to initiative measures are perfectly proper and laudable.”

After judgment for the defendant (R. 49-50), petitioners appealed to the court below (R. 51). The court held (R. 134-138) that the regulation disallowing the expenditure was proper and applied to situations where the proposed legislation was before the people, as well as where the legislation was only before a legislature. The court rested its affirmance on the additional ground (R. 138-139) that, in view of Finding 9 (*supra*, page 7) petitioners failed to establish “that the passage of the initiative would have impaired its business as a beer distributor.” A timely petition for rehearing was denied (R. 140), after which this Court granted certiorari (R. 140).

SUMMARY OF ARGUMENT

I. A. Sums expended by a taxpayer to preserve his business or occupation from destruction are, as a matter of law, deductible as ordinary and necessary business expenses. *Commissioner v. Heininger*, 320 U. S. 467. On that principle, the deduction claimed in the present case should have been allowed, for petitioners' expenses here were incurred to save their existing business from destruction and not merely in an attempt to create a new business for the future.

B. Where, however, allowance of a deduction would frustrate sharply defined state or national policy, the expenditure is not regarded as "necessary". Penalties paid because of violation of state laws are an example. *Tank Truck Rentals v. Commissioner*, 356 U. S. 30; *Hoover Express Co. v. United States*, 356 U. S. 38. But the policies frustrated must be national or state policies evidenced by some governmental declaration, and therefore an optician who shared his profits with doctors in order to remain in business was held entitled to deduct his payments, however much they may have been unethical so far as the doctors were concerned. *Lilly v. Commissioner*, 343 U. S. 90. Lobbying expenses are not deductible, *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, because lobbying—the use of personal influence on individual legislators, personal solicitation, the spreading of insidious influences through legislative halls—offends against well recognized public policy.

C. But while lobbying is condemned, open, honest, non-lobbying efforts directed at obtaining the enactment of legislation by overt advocacy are not. This Court's decisions recognize the validity of such latter efforts even in situations where the compensation payable is contingent on the enactment of the legislation. *E.g.*, *Nutt v. Knut*, 200 U. S. 12; *McGowan v. Parish*, 237 U. S. 285; *Winton v. Amos*, 255 U. S. 373. Thus it is plain that what was done here, which did not involve lobbying in its narrow and invidious sense, was not within the condemnation of *Textile Mills*; the latter decision dealt only with lobbying—"that family of contracts to which the law has given no sanction"—and it has always been thus narrowly construed by this Court.

D. Insofar as the regulation now in question goes beyond lobbying as such, and denies deductions for "Sums of money expended for * * * the * * * defeat of legislation," it goes beyond the scope of *Textile Mills*; it disregards the well settled distinction between lobbying, which is condemned, and legitimate legislative activity, which is not; and it ignores *Commissioner v. Heininger*, 320 U. S. 467, which holds that expenditures to save an existing business from destruction are "ordinary and necessary" as a matter of law. There is no warrant in the statute or in any decisions here for the purported blanket rule that no expenditures in connection with legislation are ever deductible, regardless of circumstances. Here, as in *Bingham's Trust v. Commissioner*, 325 U. S. 365, the Commissioner has by fiat carved an exception out of the statute; here, as in *Bingham's Trust*, the regulation is unauthorized.

II. In any event, a regulation denying deductibility to expenditures made for the defeat of "legislation" cannot validly be construed to cover legislation enacted, not by a legislature, but directly by the people themselves in the exercise of their underlying residual sovereignty. The notion that "legislation is legislation", espoused below, overlooks completely a significant phase of American political development that had its origin in popular distrust of legislative bodies, and that sought a solution in restoration of the people's sovereignty through direct legislation by the people in initiative and referendum. The holding below, that activities directed at legislation pending in legislative halls are identical with activities directed at legislation pending before the electorate at large, would preclude the attainment of the very objectives of the initiative, a device adopted to protect the people from the frailties of their legislators, and from the

lobbying pressures to which the latter were subjected. The distinction between lobbying, with all its sordid connotations of insidious influences, and the attempts here involved, "to saturate the thinking of the community," is clear-cut, and has received recognition here. *United States v. Rumely*, 345 U. S. 41; *United States v. Harriss*, 347 U. S. 612. Indeed, any attempt to equate the two would raise serious constitutional questions here, since to deny an exemption to taxpayers who engage in certain forms of speech is in effect to penalize them for such speech. *Speiser v. Randall*, 357 U. S. 513, 518.

The Tax Court, in allowing deductions for expenses incurred in furthering a constitutional amendment that a lawyer taxpayer considered helpful in improving his practice, recognized the distinction between arguments directed at a legislature and those addressed to the entire electorate. *Luther Ely Smith*, 3 T. C. 696. There is no sound distinction between that case and this one; neither the constitutional amendment there nor the initiative here required action by the legislature. Both were equally direct legislation enacted by the people in the exercise of their underlying sovereignty. For fourteen years the Commissioner acquiesced in *Luther Ely Smith*, only to withdraw his acquiescence after certiorari was granted in the present case. His new, *post motam litem* position is that sums expended in any attempt to enact or defeat legislation, including a constitution which is fundamental law, are not deductible regardless of the effects of such legislation on the taxpayer's business, is without support in authority, runs counter to the statute, and has only the doubtful merit of novelty.

III. A. The reenactment doctrine does not sustain the regulation in its application to the facts of the

present case. To begin with, that doctrine is subject to serious qualifications: It is unreliable, an auxiliary tool at best, and cannot alter statutory provisions that are clear and explicit when related to the facts disclosed. Moreover, Congress cannot be expected to make an affirmative move whenever a lower court indulges in an erroneous interpretation.

B. The regulation denying deductions for legitimate legislative activities has never been passed on in any situation where the legislation being opposed would necessarily have destroyed the taxpayer's business. Accordingly, it has never been reenacted in that context.

Moreover, Section 23(a) of the Code deals with trade or business expenses, while the regulation now in question is headed and indexed under Sec. 23(o), "Charitable and other contributions." One subsection deals with business expenses, the other with deductible contributions by any taxpayer whether in business or not. Unlike the regulation involved in *Textile Mills*, which had a long history, the present regulation dates only from 1938. Surely if the conscientious Congressman facing the bill that became the Internal Revenue Code of 1939 had sought to ascertain the meaning of "ordinary and necessary" business expenses in draft Section 23(a)(1), he would never have looked to a regulation entitled "Contributions or gifts to individuals" to find that meaning. Nor would it ever have occurred to him that expenditures by a businessman to defeat, without resort to lobbying, legislation that would have destroyed his existing business were not deductible as ordinary and necessary business expenses, by reason of the fact that contributions by taxpayers whether in business or not were not

deductible when made to organizations substantially engaged in opposing legislation.

C. It is even more clear that there has been no reenactment of the regulation denying deductions for legislative expenses in its application to legislation enacted directly by the people without intervention of a legislature. For the Commissioner publicly acquiesced over a period of 14 years in *Luther Ely Smith*, 3 T. C. 696, which held the contrary. Thus there is no scope for the reenactment doctrine in the present case—except insofar as that doctrine, in the face of such an acquiescence, supports petitioners.

IV. Petitioners sufficiently proved that passage of the proposed initiative measure, which would have closed all retail stores for the sale of beer, would have impaired their wholesale business to the point of probable destruction.

The terms of the initiative, together with the uncontradicted oral testimony that 90% of all beer wholesalers would have been put out of business, established that its passage would substantially have destroyed petitioners' business. A wholesaler sells to retailers, and when there are no retailers to sell to—which is what the initiative would have meant—he is out of business. The alternative holding of the courts below that petitioners did not sustain their burden of proof on the issue of destruction of business is a consequence of thinking in terms of words rather than of commercial relationship. Facts within judicial notice, even apart from the evidence in the record, establish the connection between the initiative's closing of retail stores and the consequent destruction of petitioners' wholesale business. The alternative holding below is also deficient on narrower and more technical grounds;

the finding on which it rests is "clearly erroneous" under Rule 52(b), F.R.Civ.P., and the doctrine of judicial admissions precludes withdrawal of the Government's formal concession prior to trial that the initiative measure would have put petitioners out of business.

Nor is there substance in the Government's new contention that petitioners' proof is deficient in not showing that they would have been within the 90% of the beer wholesalers put out of business. Mathematical certainty is not required; a genuine threat is sufficient to establish that expenditures made to avert the destruction so threatened are "ordinary and necessary" in the context of the statute. *Commissioner v. Heining*, 320 U. S. 467, 472. Nothing turns on mere percentages here; a 90 per cent threat is enough.

ARGUMENT

The present petitioners, individual taxpayers, seek to establish a deduction in respect of money spent to defeat an initiative measure that would have destroyed their existing business. Both courts below held that this could not be done in the face of a regulation stating that "Sums of money expended for lobbying purposes [and] the promotion or defeat of legislation" were not deductible.

It is petitioners' first position that, while expenditures for lobbying purposes—the exercise of personal influence and solicitation on individual legislators—are properly disallowed as deductions on grounds essentially of public policy, there is no warrant for similarly denying deductions for legitimate and open efforts directed against legislation which would have

destroyed an existing business, and that the regulation thus applied runs counter to the statute.

It is petitioners' alternative position that, whatever may be the case in respect of legislation enacted by a legislature, the regulation in question cannot in any event apply to legislation enacted by the people through the instrumentality of the initiative, and that to do so would raise a serious constitutional issue.

I. Expenses Incurred in Openly Opposing, Without Lobbying, Legislation That Would Have Destroyed the Taxpayers' Business. Do Not Run Counter to Sharply Defined State or National Policies, and Are Therefore Deductible as Ordinary and Necessary Business Expenses; and a Regulation Purporting to Disallow Such Expenditures Is Accordingly Invalid Because Contrary to the Statute.

A. Sums spent in an endeavor to protect a taxpayer's business from destruction are deductible as ordinary and necessary business expenses.

Ever since 1918, see *Kornhauser v. United States*, 276 U. S. 145, the American taxpayer has been permitted to deduct from net income "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."⁵ For the taxable year in question in the present case, this provision appeared in Sec. 23(a)(1)(A), I.R.C. 1939 (*infra*, p. 67).⁶ There have been literally thousands of decisions turning on what constitutes "ordi-

⁵ Sec. 214(a)(1) of the Revenue Acts of 1918, 1921, 1924, and 1926; Sec. 23(a) of the Revenue Acts of 1928, 1932, 1934, and 1936; Sec. 23(a)(1) of the Revenue Act of 1938. Earlier provisions were the same in substance though slightly different in language. Sec. II(B)[2] of the Revenue Act of 1913; Sec. 5(a) (First) of the Revenue Act of 1916.

⁶ The corresponding provision of I. R. C. 1954 is § 162(a).

nary and necessary expenses." Today even more than twenty-five years ago (*Welch v. Helvering*, 290 U. S. 111, 116), "To attempt to harmonize them would be a futile task." This much, however, is now clear: Sums expended by the taxpayer to preserve his business or occupation from destruction are deductible.

The leading case is *Commissioner v. Heininger*, 320 U. S. 467, where a mail order dentist, threatened with being put out of business by a Post Office fraud order, incurred legal expenses in defending the proceedings. Although he was ultimately unsuccessful in his defense, see *Heininger v. Farley*, 105 F. 2d 79 (D. C. Cir.), certiorari denied, 308 U. S. 587, he was permitted to deduct the legal fees paid. This Court said (320 U. S. at 471, 472):

"It is plain that respondent's legal expenses were both 'ordinary and necessary' if those words be given their commonly accepted meaning. For respondent to employ a lawyer to defend his business from threatened destruction was 'normal;' it was the response ordinarily to be expected. * * * Since the record contains no suggestion that the defense was in bad faith or that the attorney's fees were unreasonable, the expenses incurred in defending the business can also be assumed appropriate and helpful, and therefore 'necessary.' * * * To say that this course of conduct and the expenses which it involved were extraordinary and unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world."

The *Heininger* result had been foreshadowed by Mr. Justice Cardozo's discussion in *Welch v. Helvering*, 290 U. S. 111, 114:

"Ordinary in this context does not mean that the payments must be habitual or normal in the sense

that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. Cf. *Kornhauser v. United States*, 276 U. S. 145. The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part."

And so, in a variety of situations, sums expended by a taxpayer to preserve his business or occupation from destruction have been held deductible. Thus, an officer facing a court-martial and the consequent risk of dismissal from the service may deduct counsel fees incurred in defending against the charges, since, of course, his business is that of being an officer, and the court-martial would determine whether he should lose that status and its income concomitants. *Lindsay C. Howard*, 16 T. C. 157, affirmed on another issue, 202 F. 2d 28 (C. A. 9). A motion picture scenario writer, summoned to appear before a Congressional committee and facing possible blacklisting by the industry, may deduct the sums paid counsel for representing him with a view to preventing his loss of livelihood. *Waldo Salt*, 18 T. C. 182. A public entertainer may deduct counsel fees incident to the prosecution of an action for libel brought solely for the protection of his business income. *Paul Draper*, 26 T. C. 201. And expenditures made to protect a taxpayer's business reputation are similarly deductible. *Laurence M. Marks*, 27 T. C. 464. It is only when such expenditures are related to personal as distinguished from business

reputation that they are non-deductible under the statute. *Joseph Lewis*, 27 T. C. 158, affirmed *sub nom. Lewis v. Commissioner of Internal Revenue*, 253 F. 2d 821 (C. A. 2).

On the foregoing principle, the deduction claimed in the present case should have been allowed. As Mr. Justice (then Judge) Minton said in the *Heininger* case below (*Heininger v. Commissioner of Internal Revenue*, 133 F. 2d 567, 570 (C. A. 7)), later quoted with approval by this Court in *Lilly v. Commissioner*, 343 U. S. 90. 94, note 4,

“If the deduction in the case at bar was not an ordinary and necessary expense to the ‘carrying on’ of the business, we are unable to understand the English language. Without this expense, there would have been no business. Without the business, there would have been no income. Without the income there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary.”

A very similar question was recently passed upon by the House of Lords. *Morgan v. Tate & Lyle Ltd.*, [1955] A. C. 21, affirming [1953] Ch. 601. There a corporation threatened with nationalization expended corporate funds in campaigning against such a course on the part of Parliament. It was held that such sums were deductible within Rule 3(a), a regulation having the force of law because a part of the Schedule to the Act in question, as (p. 36) “disbursements or expenses * * * wholly and exclusively laid out or expended for the purposes of the trade.” Lord Morton of Henryton said (p. 39 of [1955] A. C.):

“Can it properly be held that money spent to prevent seizure by the State of the company’s assets,

including the goodwill of the business carried on by the company, is money 'wholly and exclusively laid out or expended for the purposes of the trade' within the meaning of rule 3(a)? * * *

"My Lords, apart from authority I should have no hesitation in answering the question just posed in the affirmative. Looking simply at the words of the rule I would ask: 'If money so spent is not spent for the purposes of the company's trade, for what purpose is it spent?' If the assets are seized, the company can no longer carry on the trade which has been carried on by the use of these assets. Thus the money is spent to preserve the very existence of the company's trade."⁷

It is significant that in the present case petitioners' expenses were incurred to save their existing business from destruction and not merely in an attempt to create a new business in the future. The latter may for present purposes be assumed to be non-deductible by analogy to the holding in *McDonald v. Commissioner*, 323 U. S. 57, 60—"his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years." It is on that basis that most instances of expenses incurred in direct appeals to the electorate in the endeavor to legal-

⁷ Where however a pamphlet is circulated with purposes not solely of advancing the company's trade, the expenses incurred are non-deductible. *Boarland v. Kramat Pulai Ltd.*, [1953] 1 W. L. R. 1332 (Ch. D.). An earlier Privy Council case, which disallowed expenses incurred by brewers in persuading the public to vote against prohibition in New Zealand, is distinguishable, because there the statute (p. 149) disallowed expenses "not exclusively incurred in the production of the assessable income derived from that source," and hence is not regarded as authority in England for English income tax legislation, which has a different statutory standard for deductible business expenses. *Ward & Co. v. Commissioner of Taxes*, [1923] A. C. 145, 149-150; see *Morgan v. Tate & Lyle Ltd.*, [1955] A. C. at 43, 49-50, 63.

ize a future business presently illegal have been disallowed. *E.g.*, *Mrs. William P. Kyne*, 35 B. T. A. 202 (horse racing); *cf.* *Mays v. Bowers*, 201 F. 2d 401 (C. A. 4) (to be elected a city councilman); *cf.* also *Old Mission P. Cement Co. v. Commissioner of Int. Rev.*, 69 F. 2d 676 (C. A. 9), affirmed on other issues, 293 U. S. 289 (effect of referendum measure on business held too remote). But petitioners here did not appeal to the voters to gain office prospectively or to be permitted to engage in a business then unlawful; they made the expenditures in an ultimately successful effort to preserve from certain destruction an existing business then and now entirely lawful.

There is accordingly no need at this juncture to re-examine *McDonald v. Commissioner*, 323 U. S. 57, which, since no opinion of the Court was rendered therein, cannot be considered as authoritative.⁸ For present purposes petitioners are content to rest on the clear distinction between their situation—threatened destruction of an existing business—and that of *McDonald*—the attempt to embark on a new business.

B. Where allowance of a deduction would frustrate sharply defined state or national policy, the expenditure is not regarded as "necessary", and accordingly sums expended for lobbying purposes, an activity that contravenes public policy because of its sinister tendencies, are not deductible.

Certain limitations on deductibility foreshadowed by the *Heininger* case, 320 U. S. at 173—"that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct"—were clarified at the Term just

⁸ " . . . the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." *United States v. Pink*, 315 U. S. 203, 216; *Hertz v. Woodman*, 218 U. S. 205, 212-214.

past. Thus, penalties paid by truck owners and their employees for violating penal laws of a state are non-deductible, *Tank Truck Rentals v. Commissioner*, 356 U. S. 30, even if inadvertent. *Hoover Express Co. v. United States*, 356 U. S. 38. In the same category of non-deductibility are payments of hush money (*Samuel Towers*, 24 T. C. 199, 244-247), payments for solicitations of insurance forbidden by state insurance laws (*Boyle, Flagg & Seaman, Inc.*, 25 T. C. 43), and payments of bribes by way of "protection" (*Cohen v. Commissioner of Internal Revenue*, 176 F. 2d 394, 400-401 (G. A. Comeaux) (C. A. 10)).

On the other hand, expenses such as rent and salaries that are plainly deductible in respect of a lawful enterprise do not lose their deductibility because incurred in the conduct of a business that is clearly unlawful. *Commissioner v. Sullivan*, 356 U. S. 27. The thrust of "sharply defined national or state policies" does not, in the absence of clear expression of Congressional intent, operate to make an illegal enterprise pay taxes on a gross receipts basis.

Moreover, "The policies frustrated must be national or state policies evidenced by some governmental declaration of them." *Lilly v. Commissioner*, 343 U. S. 90, 97. Consequently, as the Court held in that case, the Commissioner could not disallow on grounds of public policy deductions of kickback payments made by opticians to physicians in the regular course of their optical enterprise. The payments in question were unethical in the eyes of many doctors, but still they were ordinary and necessary business expenses within the Internal Revenue Code in the context of the opticians' business. This Court accordingly reversed successive holdings by the Tax Court and the Court of Appeals that had denied the deductions on

the basis that they violated public policy. The Court said (p. 93):

“The payments likewise were ‘necessary’ in the generally accepted meaning of that word. It was through making such payments that petitioners had been able to establish their business. Discontinuance of the payments would have meant, in 1943 or 1944, either the resumption of the sale of glasses by the doctors or the doctors’ reference of their patients to competing opticians who shared profits with them.”

Thus the Court in *Lilly* reaffirmed the holding in *Heininger* that expenditures incurred for preserving an existing business are, as a matter of law, “ordinary and necessary” within the meaning of Sec. 23(a)(1)(A), I. R. C. 1939.

There still remains an area not yet clarified by decisions of this Court. As we have pointed out, *Heininger* allowed the deduction of legal expenses incurred in unsuccessfully seeking to set aside a postal fraud order that put the taxpayer out of business, and did so in the face of contentions by the Commissioner (Pet. Br., No. 63, Oct. T. 1943, at 20) that “To allow the deduction would be to allow compensation for the costs which law enforcement has caused the one who has transgressed,” and that (*id.*, 21) “We know of no instance heretofore where expenditures incurred as the result of unsuccessfully resisting disciplinary measures instituted by the sovereign have been permitted by the courts to be deducted as ordinary and necessary business expenses.”

In *Heininger*, the “disciplinary measures instituted by the sovereign” took the form of a fraud order supported by substantial evidence. *Heininger v. Farley*, 105 F. 2d 79, *supra*. Thereafter, Congress passed the

Federal Denture Act of 1942, now 18 U. S. C. § 1821, that prohibited the interstate transportation of dentures under stated conditions even in the absence of fraud. See *United States v. Johnson*, 323 U. S. 273. Suppose that, at the present time, the "disciplinary measures instituted by the sovereign" against Dr. Heininger or other dentists similarly situated took the form of a prosecution under 18 U. S. C. § 1821; would the legal fees incurred in defending such a prosecution be deductible? The state of the present cases seems to be that such fees can be deducted only if the prosecution fails, not if it succeeds. See *Commissioner v. Heininger*, 320 U. S. 467, 473, note 8; see also cases collected in 104 A. L. R. 680, 683-686; 20 A. L. R. 2d 600, 612-617. The Tax Court has recently refused deduction for legal expenses incurred in unsuccessfully resisting disbarment proceedings following conviction for crime. *Thomas A. Joseph*, 26 T. C. 562. Since the defendant who is acquitted is allowed his deduction, it is hardly open to urge that a similarly allowed deduction for the convicted client subsidizes obduracy (cf. *Jerry Rossman Corporation v. Commissioner of Int. Rev.*, 175 F. 2d 711, 713 (C. A. 2)), and we should suppose that the public policy of the Sixth and Fourteenth Amendments, provisions that so clearly recognize the constitutional basis of the effective assistance of counsel (*Powell v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 458; *Gibbs v. Burke*, 337 U. S. 773), would militate against penalizing a taxpayer who availed himself of the protection that those Amendments afford him.

We do not need to formulate an answer now, but the speculations just canvassed are far from irrelevant here, in view of the Government's contentions

that petitioners have not proved to a mathematical certainty that the initiative measure in his case would have put them out of business. See Point IV, at pp. 63-65, *infra*.

We return to those areas where the law is certain. If a taxpayer engages in lobbying to advance his business, he cannot deduct his lobbying expenses. *Textile Mills Corp. v. Commissioner*, 314 U. S. 326. There (p. 336) "A publicist was retained to arrange for speeches, news items, and editorial comment. Two legal experts were retained to prepare propaganda concerning international relations, treaty rights and the policy of this nation as respects alien property in time of war." Moreover, "F. W. Mondell, an attorney and a former member of Congress, was employed in connection with the preparation and making of proposals and suggestions to members of Congress, 'the aim of which was to promote the speedy enactment of the desired legislation.' " 38 B. T. A. at 625; 117 F. 2d at 63.⁹ As a former member of the House, Mr. Mondell had the privilege of its floor, subject only to his being "not interested in any claim or directly in any bill pending before Congress" (Rule XXXIII(1), H. R. Doc. 661, 68th Cong., 2d sess.; *id.*, H. R. Doc. 781, 69th Cong., 2d sess.; *id.*, H. R. Doc. 629, 70th Cong., 2d sess.) The quoted language was not construed until 1945 to cover former members of the House "in the employ of an organization that is interested in legislation before the Congress" (H. R. Doc. 489, 84th Cong., 2d sess., p. 489). Moreover, Mr.

⁹ No question was raised either before the Board of Tax Appeals on the Third Circuit as to the deductibility of sums subsequently paid Mr. Mondell for legal services in connection with specific claims. See 38 B. T. A. at 626, 627; 117 F. 2d at 64.

Mondell had been majority floor leader in the 66th and 69th Congresses. *Biographical Directory of the American Congress, 1774-1949*; H. R. Doc. 607, 81st Cong., 2d sess., pp. 1575-1576. Thus the Government is plainly in error in suggesting (Br. Op. 8) that no direct dealings with individual legislators were involved in the *Textile Mills* case.

This Court pointed out (p. 337) that "The ban against deductions of amounts spent for 'lobbying' as 'ordinary and necessary' expenses of a corporation derived from a Treasury Decision in 1915. T. D. 2137, 17 Treas. Dec. Int. Rev. pp. 48, 57, 58."

Further (pp. 338-339)—

"Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist v. Child*, 21 Wall 441; *Hazelton v. Sheckels*, 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in the absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn."

Petitioners do not question *Textile Mills* in any way. Their position under Point I of this brief is that, as the findings (R. 47; cf. R. 29) show, they did

not engage in lobbying in the invidious sense; that *Textile Mills* applies, and has been understood as applying, only to lobbying; and that it does not apply to legitimate non-lobbying efforts in connection with legislation, which, as this Court has frequently recognized, do not belong to "that family of contracts to which the law has given no sanction."

C. Decisions of this Court recognize a clear distinction between open, honest, non-lobbying efforts directed at legislation, such as were involved in the present case, and the character of activities long characterized as lobbying.

This Court has repeatedly and consistently recognized a clear line of distinction between the insidious practice of lobbying and the wholly proper activity of obtaining the enactment of legislation by open advocacy.

The essence of lobbying lies in personal solicitation and in the exercise of personal influence, acts that are furthered by secrecy, and by the circumstance that the principal on whose behalf the influence is exerted is so often an undisclosed one. The evil tendencies reflected in the *Textile Mills* record—an astute publicity man spreading propaganda impossible to trace to its source; a lawyer of acknowledged reputation writing articles on abstract questions of international morality without disclosing that he was doing so on behalf of a client; an ex-Congressman (and ex-majority leader) availing himself of his floor privileges to buttonhole and to cajole legislators, including former colleagues—those were activities familiar to the lobbyists of a much earlier age. See *Marshall v. Baltimore & O. R. Co.*, 16 How. 314, and see particularly the outline of

the techniques used, pp. 316-319, which, we might add, are hardly less cynical or less effective than anything devised in the more than 110 years that have passed since. In condemning as illegal the contract for lobbying services involved in that case, this Court emphasized that its primary vice lay in the secrecy surrounding the process of solicitation. See 16 How. at 335:

“* * * But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the Legislature. * * * Any attempts to deceive persons intrusted with the high function of legislation, by secret combinations, or to create or bring into operation undue influence of any kind, have all the injurious effects of a direct fraud on the public. * * *

“Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means, and the exercise of undue influence. * * *

The doctrine of the *Marshall* case, where this Court first had occasion to deal with the evil propensities of lobbying that offended against public policy, was followed in *Trist v. Child*, 21 Wall. 441, 451:

“The agreement in the present case was for the sale of influence and exertions of the lobby agent to bring about the passage of a law for the pay-

ment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy."

Again, a lobbying contract was condemned in *Hazleton v. Sheckels*, 202 U. S. 71, 79:

"The objection to them rests in their tendency, not in what was done in the particular case. * * * In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitation, and it intensified the inducement by the contingency of the reward."

But contracts to procure legislation by properly and openly presenting the facts to the appropriate committees or legislative bodies stand on a very different footing. Such agreements have been uniformly upheld by this Court over a long period. *Spalding v. Mason*, 161 U. S. 375 (recovery on contract for part of fees earned for prosecuting claims and urging passage of necessary legislation; arrangement apparently contingent); *Nutt v. Knut*, 200 U. S. 12 (recovery for services in getting claim legislatively allowed where no lobbying was involved, but where payment was contingent on passage); *McGowan v. Parish*, 237 U. S. 285 (same); *Winton v. Amos*, 255 U. S. 373 (same); *Steele v. Drummond*, 275 U. S. 199 (contract by property owner to secure a franchise from a municipal legislative body held valid).

The distinction between the contract for lobbying purposes that contravenes public policy, and the contract to endeavor to secure legislation by legitimate means was early set forth. See *Trist v. Child*, 21 Wall. 441, 450:

"* * * an agreement express or implied for purely professional services is valid. Within this category are included; drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics or professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitations, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business."

In *Nutt v. Knut*, 200 U. S. 12, recovery turned on whether the efforts of the lawyer in obtaining legislative relief for the client involved lobbying. This Court disposed of that matter in these terms (200 U. S. at 21-22):

"Much was said in argument as to the nature of the services rendered by the plaintiff—the charge being that his services were of the kind called *lobby* services for which, consistently with public policy and public morals, no recovery could be had in any court. *Trist v. Child*, 21 Wall. 441; *McMullen v. Hoffman*, 174 U. S. 639. We have seen that the state court of original jurisdiction was of opinion the suit was for lobbying services, and on that ground denied all relief. But the Supreme Court of Mississippi held that the record did not establish such a case, and we accept that view of the evidence in the cause."

Again, in *Winton v. Amos*, 255 U. S. 373, the same distinction was emphasized in a case allowing recovery for services rendered in obtaining legislation to benefit particular Indians. This Court said (pp. 392-393):

“The claim of Winton, Owen, and associates, is based wholly upon services rendered—nothing being asked because of expenses incurred or moneys disbursed. According to the findings the services rendered were in the nature of professional services before Congress and its committees, individual Representatives and Senators, the Dawes Commission, etc., intended to establish the right of the Mississippi Choctaws to participation in the material benefits of citizenship in the Choctaw Nation, and to secure such legislation by Congress as might be needed for the practical attainment of the object sought. The findings render it clear that services of this nature, altogether proper in character,—not lobbying, in the odious sense,—were rendered by these claimants under particular employment by many individual Mississippi Choctaws, but with the object, incidentally, of benefitting the Mississippi Choctaws as a class, because only so could the clients of the claimants be benefited. We make no doubt that, for proper professional services rendered, and expenses incurred in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursement and compensation upon the interests of those beneficiaries who receive the benefit, the same as if a like result had been reached through successful litigation in the courts. In either case there is the same curious analogy to the salvage services of the maritime law; and while it may be more difficult to weigh the effect of a service rendered in promoting legislation, and to estimate its value, than in a case of successful litigation, we think

the principle of *Internal Improv. Fund v. Greenough* and *Central R. & Bkg. Co. v. Pettus* applies in the one case as in the other."

It is particularly to be noted that recovery under the contracts involved in *Nutt v. Knut*, 200 U. S. 12; *McGowan v. Parish*, 237 U. S. 285; and *Winton v. Amos*, 255 U. S. 373, was frankly and clearly contingent upon passage of the contemplated legislation, and that the same appears to have been the fact in *Spalding v. Mason*, 161 U. S. 375. Thus there is nothing in the fact of contingency that condemns the arrangement. The contract is legal and consistent with public policy whether contingent or otherwise, just so long as the services to be rendered in connection with obtaining enactment of the legislation in question are open and professional. It is only when the contract looks to lobbying—the exercise of personal influence, the use of personal solicitation—that the arrangement stands condemned.

In *Steele v. Drummond*, 275 U. S. 199, 206, the Court cited the lobbying cases—"The claims there considered were under contracts requiring or contemplating the obtaining of legislative or executive action as a matter of favor by means of personal influence, solicitation and the like, or by other improper means."

"But," the Court continued, "this case is different. Drummond was not employed by Steele or by the railroad company to secure the passage of the ordinances. He was interested as an owner of property. Neither the contract, nor what was done, suggests that the location or construction of the proposed line was not a legitimate enterprise undertaken for the public good, or that anything improper was contemplated as a means to secure the passage of the ordinances. Drummond's object was to obtain the railway service; and, for

that purpose, he expended a large sum. The mere fact that he owned property that might be favorably affected does not tend to discredit him or to make evil his undertaking to obtain the ordinances. His interest in having the railroad extended into St. Andrews gave him the right in every legitimate way to urge the passage of appropriate ordinances. There is nothing that tends to indicate that in the promotion or passage of them there was any departure from the best standards of duty to the public. The contention that Drummond's agreement to secure their passage was contrary to public policy cannot be sustained."

Under the distinctions set forth, it is plain that what was done in the case at bar was open, above-board, legitimate, and in no sense violative of public policy. The district court specifically so found (Fdg. 11, R. 47): "There was nothing wrong or evil or corrupt about spending money for this purpose. Expenditures to enlighten and inform the public with respect to initiative measures are perfectly proper and laudable."

Earlier the district judge had said orally (R. 29):

"* * * This is not to indicate that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for

having spent the money to defeat the legislation by fair publicity. They had a right to do that and propriety of expenditures therefor is not in question. * * *¹⁰

On the facts of this case, as in connection with the contract for a concession considered in *Valdes v. Larinaga*, 233 U. S. 705, 709, 710, there was nothing "that necessarily imports, or even persuasively suggests, any improper intent or dangerous tendency"; "the things done * * * have no sinister smack." In short, no lobbying was involved.

It follows that what was done here was not within the condemnation of *Textile Mills*. For that case dealt solely and exclusively with lobbying, and has always been understood to be limited to situations involving lobbying.

The facts in *Textile Mills* involved, as has been pointed out (pp. 24-25, *supra*), precisely the secrecy and the use of personal influence that were condemned as early as *Marshall v. Baltimore & O. R. Co.*, 16 How. 314. And the distinction drawn in the *Textile Mills* opinion, quoted *supra* p. 25, "between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction", must be read against the line of cases just discussed, from *Spalding v. Mason*, 161 U. S. 375.

¹⁰ Before the initiative in the present case was submitted to the people, it had previously been submitted to the legislature, at which time an officer of the Beer Wholesalers Association contacted many of the legislators, urging defeat of the proposal. Fdg. 7, R. 45-46. This may well have been lobbying—but no deduction was or is sought in respect to any sums then expended in that connection.

to *Steele v. Drummond*, 275 U. S. 199, which show that legitimate, overt, legislative activity related to a business, far from warranting condemnation, constitutes the basis for agreements that the courts will enforce. Plainly, nothing in *Textile Mills* condemns legislative activity free from the taint of lobbying.

Nor does *Textile Mills* rest on the circumstances that the compensation to be paid the taxpayer there was contingent upon passage of the Settlement of War Claims Act. A contract for legal services looking to the enactment of legislation for a client's benefit, where compensation for such services is entirely contingent upon passage of the legislation, is perfectly legal and does not contravene public policy. *Nutt v. Knut*, 200 U. S. 12; *McGowan v. Parish*, 237 U. S. 285; *Winton v. Amos*, 225 U. S. 373; *Spalding v. Mason*, 161 U. S. 375 (*semble*). There is accordingly nothing in the discussion in *Textile Mills* that rests on the feature of contingency; the thrust of the opinion is that (314 U. S. at 338) "Contracts to spread * * * insidious influences through legislative halls have long been condemned." And, as we have also said, nothing in *Textile Mills* condemns legislative activity free from the taint of lobbying.

It is thus that *Textile Mills* has always been construed by this Court. In *Commissioner v. Heininger*, 320 U. S. 467, 473, it was cited for the proposition that "one who has incurred expenses for certain types of lobbying and political pressure activities with a view to influencing federal legislation has been denied a deduction." Similarly, in *Lilly v. Commissioner*, 343 U. S. 90, 95, it was said that in *Textile Mills* "this Court accepted an interpretation of [§23(a)(1)(A)]

by a Treasury Regulation which disallowed the deduction of certain expenses for lobbying purposes."¹¹

The result is that *Textile Mills* does not reach the present case, where no lobbying was involved.

D. Insofar as the regulation purports to prohibit deductions for "Sums of money expended for * * * the * * * defeat of legislation" in a situation where the legislation would have destroyed the taxpayers' existing business, it is in conflict with the Code which affirmatively permits deduction of "ordinary and necessary business expenses", and is to that extent invalid.

The regulation considered in *Textile Mills*, Art. 262 of Treas. Reg. 74, "Donations by corporations", stated in pertinent part that "Sums of money expended for lobbying purposes, the promotion or defeat of legislation * * * are not deductible from gross income." But, as we have just shown at some length, the *Textile Mills* decision dealt only with "money expended for lobbying purposes"; and has always been understood as applying only to lobbying.

The lower courts, however, have misread *Textile Mills*, and have construed it as authority for the much broader proposition that expenditures for "the promotion or defeat of legislation" were similarly condemned by that decision, in every situation, and regardless of circumstances. This was done by the Court below in this case, see R. 136, n. 3, even though

¹¹ For what it is worth, the Government in each case similarly limited its characterization of *Textile Mills*. See the Commissioner's Briefs in *Heininger* (Pet. Br., No. 63, Oct. T. 1943, at 16) ("* * * this Court has recently refused to sanction the deductibility, as an ordinary and necessary business expense, of lobbying expenditures to procure legislation") and in *Lilly* (Resp. Br., No. 158, Oct. T. 1951, at 54) ("the lobbying activities involved in the *Textile Mills* case").

the opinion uses the word "lobbying" no less than seven times in characterizing the regulation in question. R. 135, 136, 137, 138. The difference between lobbying and legitimate legislative activities that is expounded in the decisions of this Court cited and discussed above, pp. 28-34, was not even considered by the court below or in any of the decisions which it cited (R. 136, n. 2) or which the Government invoked in opposition to the petition for certiorari (Br. Op. 5-6).¹²

Every lower court that has considered this question has woodenly construed *Textile Mills* to condemn all legislative efforts, and every lower court that has considered this question has been utterly unaware of the rule that open legislative efforts are thoroughly legitimate and that contracts for such efforts, unlike contracts to lobby, are enforceable, have been enforced by this Court, and so are not within "that family of contracts to which the law has given no sanction." *Textile Mills*, 314 U. S. at 339.

A fortiori, where open legislative efforts are directed towards saving an existing legitimate business from destruction, and where no public policy is violated, the principle of *Commissioner v. Heininger*, 320 U. S.

¹² *F. Strauss & Son, Inc., of Ark v. Commissioner of Int. Rev.*, 251 F. 2d 724 (C. A. 8), certiorari granted, 356 U. S. 966 (No. 50, this Term); *Revere Racing Association v. Scanlon*, 232 F. 2d 816 (C. A. 1); *American Hardware & Eq. Co. v. Commissioner*, 202 F. 2d 126 (C. A. 4), certiorari denied, 346 U. S. 814; *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (C. A. 8), certiorari denied, 344 U. S. 865; *Sunset Scavenger Co. v. Commissioner*, 84 F. 2d 453 (C. A. 9); *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676 (C. A. 9), affirmed on other issues, 293 U. S. 289; *Wm. T. Stover Co.*, 27 T. C. 434; *Herbert Davis*, 26 T. C. 49; *McClintock-Trunkey Co.*, 19 T. C. 297, reversed on other grounds, 217 F. 2d 329 (C. A. 9).

467, comes into play. Such expenditures are "ordinary and necessary" within the statute. It follows that the ruling below, and the other decisions of lower courts relied on by the court below and by the Government here, all rest on a misreading of controlling authorities in enunciating a blanket rule that no expenditures in connection with legislation are deductible.

The result is that, as applied to the present case the regulation in question—Section 29.23(o)-1 of Treas. Reg. 111 (*infra*, pp. 67-69)—is necessarily invalid under the familiar principle that the application of any regulation in conflict with the meaning and purpose of a statute is unauthorized and hence without effect. *E.g.*, *Bingham's Trust v. Commissioner*, 325 U. S. 365, 377; *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 134-135. We do not consider it necessary to labor that principle or to expound it in detail.

But we think it appropriate to draw attention to *Bingham's Trust v. Commissioner*, 325 U. S. 365, just cited, because of its bearing on the problem here. There the claimed deduction arose under § 23(a)(2) of the 1939 Code, which permitted deduction of "ordinary and necessary expenses paid or incurred for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." The trustees had incurred legal expenses in the course of unsuccessfully contesting a tax deficiency. A regulation provided that "Expenses incurred * * * for the purpose of resisting a proposed additional assessment of taxes * * * are not deductible expenses." This Court held that

the regulation was in conflict with the meaning and purpose of the statute, and hence unauthorized.

The parallelism between that case and this one is plain. Here, as in *Bingham's Trust*, there is a regulation that purports to disallow a particular kind of what would otherwise be an ordinary and necessary expense, not on any ground of public policy, but by arbitrary fiat. Here, as in *Bingham's Trust*, therefore, the regulation should be struck down, and for the same reason: It is inconsistent with the deduction that Congress has specifically allowed.

II. In Any Event, a Regulation Denying Deductibility to Expenditures Made for the Defeat of "Legislation" Cannot Validly Be Construed to Cover Legislation Enacted, Not By a Legislature, But Directly by the People Themselves in the Exercise of Their Underlying Residual Sovereignty.

Even if the regulation here in question can be held validly to deny the taxpayer a deduction for sums expended in connection with legitimate, openly conducted legislative activity in connection with legislation pending in a legislature—the usual sense of the word “legislation”—there is no warrant for extending it to legislation directly enacted by the people in the exercise of their underlying residual sovereignty, here through the instrumentality of the initiative.

1. The district judge took the view that “legislation is legislation.” He said orally (R. 28-29):

“* * * In other words, the making of laws is legislation whether the laws are made by a sovereign ruler, a city council, county commissioners, a state legislature, Congress, or by the people directly through an initiative or referendum measure.

“In applying the regulation there is no rational basis for making a distinction between sums of

money spent for the purpose of influencing the public in their action on an initiative measure and sums spent with the object of influencing members of the legislature with respect to pending legislation. There certainly is not any ground for making that distinction in the language of the Treasury regulation. The regulation flatly says that sums of money expended for the promotion or defeat of legislation are not deductible from gross income. An initiative measure is just as much legislation as an act of a legislature or any other enactment of law."

Later, in a formal conclusion of law, he repeated that view (R. 48):

"* * * Plaintiffs make much of the fact that the instant publicity campaign was aimed at the people generally rather than the legislature, but no such distinction is recognized by the cited cases nor does it commend itself to reason." Certainly publicity can be directed at legislators both directly and indirectly. But more important for purposes of this case, the measure at which the instant campaign was aimed was clearly legislation, albeit subject to enactment by the people generally rather than members of a legislature."

Insofar as the court below failed to discuss the distinction between legislation by a legislature and legislation enacted directly by the people (R. 135-138), it necessarily espoused the same "legislation is legislation" view.

But such a mechanical application of dictionary definitions does more than disregard the evils inherent in lobbying, an activity plainly not practiced here, and the distinction already canvassed between lobbying and legitimate legislative activity. The views taken below are subject to the far more serious criticism that

they overlook completely an important and highly significant phase of American political development, which had its origin in popular distrust of legislative bodies, and which sought a solution in a restoration of the people's sovereignty in the form of direct legislation by the people effectuated through the initiative and referendum. Amendment 7 to the Constitution of the State of Washington (*infra*, pp. 69-70), pursuant to which the initiative here in question took place, was adopted in 1912, when the movement for measures permitting such direct legislation was at its height.

The supporters of the initiative sought to give the people the power to pass laws independently of the legislature, on the view that in a democracy the control of the people over their government should be continuous and direct. One avowed purpose of the initiative was to obviate the secret control of powerful interests over the limited number of legislators, by lobbying and otherwise. These views are set forth in a host of contemporary writings; the listing that follows is representative rather than exhaustive. See, *e.g.*, *The Initiative, Referendum, and Recall* (43 *Annals of the American Academy*, No. 132);¹³ Theodore Roosevelt, *A Charter of Democracy* [Columbus, Ohio, speech, Feb. 21, 1912], *Sen. Doc. 348, 62d Cong., 2d sess.*, pp. 11-12;¹⁴ Eaton, *The Oregon System* (1912);

¹³ "Briefly summarized, the functions of the initiative and referendum are: To restore the sovereignty of the people. To educate and develop the people. To secure legislation for the general welfare. To prevent legislation against the general welfare. To eliminate the legislative blackmailer. To make our legislative bodies truly representative." *Sen. Bourne of Oregon, Functions of the Initiative, Referendum, and Recall, id.* at 3.

¹⁴ "We hold it a prime duty of the people to free our Government from the control of money in politics. For this purpose we advocate, not as ends in themselves, but as weapons in the hands

Beard and Schultz, *Documents on the State-Wide Initiative, Referendum and Recall* (1912); Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon* (1915); DeWitt, *The Progressive Movement* (1915) 213-228; cf. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118.

To hold, as did both courts below, that activities directed at legislation pending in legislative halls are to be assimilated to activities directed at a measure presented to the electorate at large, under initiative provisions adopted in a conscious, deliberate effort to protect the people from the frailties of their elected representatives, would preclude the attainment of the very objectives of the initiative. For among the principal objectives of the initiative was the desire to obviate the evils of lobbying and of all other influences on legislators by increasing the control of the people at large over the law-making process. Ironically enough, the rulings under review in this case were made on the West Coast, where the initiative first flourished. Indeed, it is fair to say that the initiative and referendum represent the West's unique contribution to American political structure. And to hold, as did both courts below, that sums expended to oppose an initiative measure, which would have destroyed petitioners' business, are not ordinary and necessary business expenses; is to do violence not only to the language of the governing statute, but also to "the ways of conduct and the forms of speech prevailing in the business world." *Commissioner v. Heininger*, 320 U. S. 467, 472.

of the people, all governmental devices which would make the representatives of the people more easily and certainly responsible to the people's will." *Id.*, p. 3.

2. This Court has twice in recent years distinguished between lobbying, with all its sordid connotations of insidious influences, and attempts such as the one here involved, the purpose of which is "to saturate the thinking of the community." *United States v. Rumely*, 345 U. S. 41; *United States v. Harriss*, 347 U. S. 612.

In the *Rumely* case, the respondent had been convicted of contempt of Congress for refusing to disclose the names of purchasers of certain books. The resolution constituting the Committee before which he declined to answer was in these terms (p. 44):

"The Committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation." H. Res. 298, 81st Cong., 1st Sess.

Reversal of conviction by the Court of Appeals, 197 F. 2d 166 (D. C. Cir.)¹⁵ was affirmed by this Court on narrow grounds, to avoid a constitutional issue. The Court said (345 U. S. at 47):

"* * * As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed upon it below, namely, 'lobbying in its commonly accepted sense,' that is, 'representa-

¹⁵ The Court of Appeals had said, though without discussing the holdings of this Court on the point (pp. 28-34, *supra*), "In the past a difference between lobbying and 'purely professional services' in acquainting a legislature with the merits or demerits of measures was recognized at the law. * * * It may be that the line between lobbying in its pristine sense and proper professional service is too shadowy to serve as a limiting barrier to the regulatory power of the Congress. We do not have that question here * * *." 197 F. 2d at 175.

tions made directly to the Congress, its members, or its committees,' 90 App. D. C. 382, 391, 197 F. 2d 166, 175, and does not reach what was in Chairman Buchanan's mind, attempts 'to saturate the thinking of the community.' 96 Cong. Rec. 13883. If 'lobbying' was to cover all activities of anyone intending to influence, encourage, promote or retard legislation, why did Congress differentiate between 'lobbying activities' and other 'activities . . . intended to influence'? Had Congress wished to authorize so extensive an investigation of the influences that form public opinion, would it not have used language at least as explicit as it employed in the very resolution in question in authorizing investigation of government agencies? Certainly it does no violence to the phrase 'lobbying activities' to give it a more restricted scope.
* * *

Similarly, in *United States v. Harriss*, 347 U. S. 612, sustaining the validity of the Federal Regulation of Lobbying Act, 2 U. S. C. §§ 261-270, the Court adopted a narrow definition of "lobbying" to save the measure. The Court said (347 U. S. at 620-621):

“We now turn to the alleged vagueness of the purposes set forth in § 307(a) and (b).¹⁶ As in *United States v. Rumely*, 345 U. S. 41, 47, which involved the interpretation of similar language, we believe this language should be construed to refer only to 'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the

¹⁶ “(a) The passage or defeat of any legislation by the Congress of the United States.

“(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.”

lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. It is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.”¹⁷

6 Whatever may be the scope of Congressional power to require the registration of legitimate representatives, see 347 U. S. at 620, note 10, par. “Third” at 621, it is plain that this Court in *Rumely* and in *Harriss* has recognized the basic and indeed obvious difference between arguments directed at a legislature and arguments directed at the electorate at large. It need hardly be added that any attempt to equate the two would raise serious problems under the First Amendment in respect of the freedom of both speech and press. See *Speiser v. Randall*, 357 U. S. 513, 518: “It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. * * * It is settled that speech can be effectively limited by the exercise of taxing power. *Grosjean v. American Press Co.*, 297 U. S. 233. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”

The construction of the regulation that petitioners urge would of course avoid even consideration of any constitutional problem.

3. The Government argued (Br. Op. 8) that activity “to saturate the thinking of the community” “is precisely the type of activity which was involved in *Tex-*

¹⁷ Footnotes omitted.

tile Mills", referring to the preparation and dissemination of news items, speeches, editorials, and similar materials that was there involved. But this argument entirely overlooks the vital distinction between this case and that one.

Here the legislation was put before the people themselves for adoption or rejection. The legislators could not pass on it except as they might cast their own votes as individual citizens in the initiative election. In *Textile Mills*, however, passage or rejection of the Settlement of War Claims Act was dependent on the votes of Senators and Representatives, and the activities directed at the general public affected the members of Congress only indirectly. Overwhelming public approval of the Settlement of War Claims Act would not necessarily result in its enactment, nor would overwhelming public disapproval of its terms preclude its passage. Here, however, the public position on Initiative No. 13 would be directly translated into adoption or rejection. Thus the very purpose of the initiative procedure—that the people might directly express their views on pending measures, that representative government might be translated into popular government—would be attained. The Government's argument accordingly echoes the failure of both opinions below to recognize the difference between initiative legislation directly enacted by the people and ordinary legislation enacted by their representatives.¹⁸

It seems worth while to add, even at the risk of repetition, that appeals to the electorate can scarcely

¹⁸ We have already, pp. 24-25 *supra*, adverted to the Government's erroneous assertion (Br. Op. 8) that *Textile Mills* did not involve direct dealings with legislators.

be equated with what was condemned in *Textile Mills* (314 U. S. at 338), the effort "to spread * * * insidious influences through legislative halls."

4. The Tax Court has recognized the distinction between arguments directed at a legislature and publicity addressed to the entire electorate.

In *Luther Ely Smith*, 3 T. C. 696, the question concerned the right of the taxpayer, a trial lawyer, to deduct as an ordinary and necessary business expense a contribution made to an organization formed to amend the Constitution of Missouri by providing that candidates for judicial office should be nominated by a Commission. The taxpayer established that his trial practice had suffered under the existing method of selecting judges because his clients had lost confidence in the courts. The contribution was expended for publicity in support of the amendment in the form of speeches, literature, and radio broadcasts. The amendment was adopted, and, being self-operative, became law forthwith.

In allowing the deduction, the Tax Court rested its conclusion on the basis that no lobbying was involved because the people themselves acted. It said (3 T. C. at 702):

"It should be noted that the institute engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the constitution, proposed by the initiative of the people, voted upon at a general election, and becoming self-operative thirty days thereafter, without the necessity of any action or approval by either the legislature or the governor."

We submit that there can be no sound distinction between a campaign directed at the voters generally in respect of a constitutional amendment that takes effect without action of the legislature, and an initiative measure that similarly takes effect. Both are equally direct legislation enacted by the people in the exercise of their underlying sovereignty.

Luther Ely Smith was decided a few years after *Textile Mills*. If the Commissioner had regarded the former case as inconsistent with this Court's *Textile Mills* ruling, it would have been his duty to take an appeal or, at the very least, to have noted his non-acquiescence. In fact, he acquiesced in *Luther Ely Smith*, see 1944 Cum. Bull. 26, and in the Petition for Certiorari we added (Pet. 10), "and his acquiescence has never been withdrawn." That statement was accurate when it was made. Later, however, after the Petition for Certiorari herein was granted, and some fourteen years after the original acquiescence, the Commissioner withdrew it. Rev. Rul. 58-255, *Int. Rev. Bull.*, No. 1958-21, May 26, 1958, pp. 9, 16-17.¹⁹

Of course this long-delayed change of position has "the usual infirmity of *post litem motam*, self-serving declarations." *United States v. Rumely*, 345 U. S. 41, 48. Of genuine weight it has none; and, far from persuading that *Luther Ely Smith* is wrong, this almost comical about-face fourteen years after the event lends strong support to petitioners' view that *Luther Ely Smith* and the decision now under review are inconsistent and cannot stand together. But what is perhaps more significant is that the Commissioner's

¹⁹ On May 26, 1958, the day of issue, this Court also granted certiorari in the *F. Strauss & Son* case, 356 U. S. 966 (now No. 50, this Term.)

belated revelation as to the scope of the regulation is demonstrably unsound.

5. Here is the operative portion of the Commissioner's present position (*Int. Rev. Bull.*, May 26, 1958, p. 17):

"It has long been the position of the Internal Revenue Service that amounts expended in furtherance of an attempt to promote or defeat legislation, either before a legislature or before the general electorate, are not deductible, for Federal income tax purposes, as ordinary and necessary business expenses within the meaning of section 162 of the Internal Revenue Code of 1954 or corresponding provisions of the 1939 Code. This position has been sustained in *Textile Mills Securities Corporation v. Commissioner*, 314 U. S. 326 (1941), C. B. 1941-2, 200; *Sunset Scavenger Co., Inc. v. Commissioner*, 84 F. 2d 453 (9th Cir. 1936); *Revere Racing Association v. Scanlon*, 232 F. 2d 816 (1st Cir. 1956); *Commarrano v. U. S.*, 246 F. 2d 751 (9th Cir. 1957), cert. granted March 3, 1958; and *F. Strauss & Son, Inc. v. Commissioner*, 251 F. 2d 724 (8th Cir. 1958).

"Inasmuch as a constitution is a general or fundamental law, an attempt to influence the adoption or rejection by the general electorate of a constitutional amendment is basically an attempt to promote or defeat legislation. Accordingly, expenditures to promote or defeat a constitutional amendment are not deductible as ordinary and necessary business expenses within the meaning of section 162 of the Code."

Passing the point that two of the cases cited are now here and that the foregoing solemn assertion of "It has long been the position", etc., conveniently overlooks that for fourteen years it was the Commissioner's view that a constitutional amendment was not

legislation within the regulation, the basic infirmity of the foregoing categorical, generalized rule now announced is two-fold.

First, it ignores the distinction, fully discussed above, pp. 28-34, between legitimate legislative activity and "that family of contracts to which the law has given no sanction."

Second, it ignores the fact that only improper contracts dealing with matters pending in a legislature—not contracts dealing with matters pending before the voters—have ever been condemned. Here is the rule from the *Restatement of the Law of Contracts*:

"§ 559. Bargain to Influence Legislation.

"(1) A bargain to influence or to attempt to influence *a legislative body or members thereof*, otherwise than by presenting facts and arguments to show that the desired action is of public advantage, is illegal; and if a method is provided by law for presenting such facts and arguments, a bargain that involves presenting them in any other way is illegal.

"(2) A bargain to conceal the identity of a person on whose behalf arguments to influence legislation are made, is illegal."

We have added the italics to emphasize the lack of foundation for the Commissioner's current views. Those views are accordingly entirely novel. But since this case involves taxes rather than patents, the Government can obtain no advantage from the Commissioner's undoubted priority of invention.

6. It must not be overlooked that, under *Heininger*, *Lilly*, *Tank Truck Rentals*, and *Sullivan*, the only basis for denying a deduction for what would be ordinary and necessary business expenses in the light of

"the ways of conduct and the forms of speech prevailing in the business world" would be that the tax deduction consequences would "frustrate sharply defined national or state policies proscribing particular types of conduct." *Heininger* at 472, 473.

Just what national or state policies are frustrated when the people amend their fundamental law, or when, under initiative provisions, they vote on a legislative measure? And just what state or national policies are frustrated when a taxpayer expends sums in opposition to or in support of proposed constitutional amendments or initiative measures that would directly affect his business? To ask these questions is to underscore the capriciously arbitrary nature of the Commissioner's newly formulated expression of supposed public policy.

True, it is the Commissioner's duty to protect the revenue. But it is not part of his duty, and it is certainly not within his competence, to reject the most fundamental aspects of representative government in order to collect a few tax dollars. Here he appears willing—nay, eager—to sell the birthright of democracy that is his in common with his fellow-citizens in order to avoid having to refund \$153.98 (R. 10, 15; 21).

In the context of the statute, which permits deduction from gross income of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business;" in the context of the facts, which show petitioners incurring expenses in order to defeat an initiative measure which would have destroyed their existing business; and in the context of the political structure of the State of Washington, which provided as well for

arguments for and against to be addressed to the electorate, it is plain that petitioners' expenditures were legitimate business expenditures whose deduction cannot be denied by administrative fiat.

For, insofar as the present litigation is concerned, the vice of the Commissioner's incursion into political science is that, in the process, he has given his regulation an interpretation that brings it into conflict with the statute.

III. The Reenactment Doctrine Does Not Serve to Sustain the Regulation in Its Application to the Facts of the Present Case.

The court below (R. 138) and the Government in opposing review here (Br. Op. 7) argued that there has been Congressional reenactment of the regulation that is in question in this case. But this "usual last resort" (*Buck v. Bell*, 274 U. S. 200, 208) of the tax gatherer will not survive examination.

A. The reenactment doctrine, in all but the clearest cases, is subject to serious qualifications.

To begin with, as this Court has frequently recognized, the doctrine of reenactment is a weak and unreliable reed on which to rest statutory interpretation. "Reenactment—particularly without the slightest affirmative indication that Congress ever had the * * * decision before it—is an unreliable indicium at least. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100, 101; *Koshland v. Helvering*, 298 U. S. 441, 447." *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, 431. "But the doctrine of legislative acquiescence is at least only an auxiliary tool for use in interpreting ambiguous statutory provisions. See *Helvering v. Reynolds*, 313 U. S. 428, 432. Here the language and the purpose of Congress seem clear to us." *Jones v. Liberty Glass*

Co., 332 U. S. 524, 533-534. "Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed." *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 759.

Next, the fact that a few decisions have intervened does not and cannot mean that Congress has by reenactment of the statute approved the decisions. "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action." *Jones v. Liberty Glass Co.*, 332 U. S. 524, 534. Or, as Judge Learned Hand once expressed the matter, "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already." *F. W. Woolworth Co. v. United States*, 91 F. 2d 973, 976 (C. A. 2), certiorari denied, 302 U. S. 768.

Finally, and this is vital in the present connection, "the rule that re-enactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment." *United States v. Missouri P. R. Co.*, 278 U. S. 269, 279-280.

The Government's reenactment arguments must now be considered in the light of the foregoing principles.

B. The regulation denying deductions for legitimate legislative activities has never been passed on in a situation where the legislation being opposed would have destroyed the taxpayer's business, and hence was never reenacted in that context.

None of the cases relied on by the court below and by the Government here under the reenactment doctrine involved the situation of expenditures opposing legislation which would have destroyed a taxpayer's existing business. Here they are (R. 138; Br. Op. 7): (1) *Textile Mills Corp. v. Commissioner*, 314 U. S. 326; (2) *Sunset Scavenger Co. v. Commissioner*, 84 F. 2d 453 (C. A. 9); (3) *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (C. A. 8), certiorari denied, 344 U. S. 865; (4) *American Hardware & Eq. Co. v. Commission of Int. R.*, 202 F. 2d 126 (C. A. 4), certiorari denied, 346 U. S. 814.

(1) *Textile Mills* has already been considered at length, pp. 24-25, 33-36, 44-46, *supra*. *Textile Mills* dealt with lobbying, which is not involved in the present case. *Textile Mills* did not deal with legitimate legislative activities directed against legislation that threatened destruction of the taxpayer's business, which is involved in the present case.

(2) *Sunset Scavenger* did not involve any inescapable destruction of business, and was moreover (84 F. 2d at 457) rested on the court's prior decision in *Old Mission P. Cement Co. v. Commissioner of Int. Rev.*, 69 F. 2d 676 (C. A. 9), affirmed on other issues, 293 U. S. 289, where the referendum for an increased gas tax levy to provide additional funds for road building (69 F. 2d at 677) bore only very remotely on the taxpayer's business, and where moreover the taint of lobbying was present; there the expenditure was listed on the taxpayer's books as "All California Highway Lobbying \$3,000" (69 F. 2d at 681).

(3)(4) In both *Roberts Dairy* and *American Hardware* the expenditures took the form of contributions to the National Tax Equality Association, an organization which of course could not qualify within § 23 (q)(2) of the 1939 Internal Revenue Code, which dealt with the deduction of religious, charitable, scientific, educational and similar contributions by corporations. No question of the imminent destruction of an existing business was even remotely involved.

Consequently, even if knowledge of any of these decisions could be shown to have been brought home to the members of Congress who codified Section 23 (a)(1)(A) of the 1939 Code, or who participated in renumbering and recaptioning it in 1942 (Sec. 121(a) of the Revenue Act of [Oct 21,] 1942, c. 619, 56 Stat. 798, 819), it would not and could not have occurred to the most astute individual among them that, by taking such action with respect to a provision permitting the deduction of ordinary and necessary business expenses, he was simultaneously denying a taxpayer faced with legislation that threatened extinction of his business the right to deduct sums spent in openly opposing that legislation by means that did not involve lobbying.

In this connection, it must be borne in mind that the basic statute in the present case is Section 23 of the Code, "Deductions from gross income", and that the pertinent subsections are "(a) Expenses; (1) Trade or business expenses." The regulation now in question is Treas. Reg. 111, Sec. 29.23(o)-1, "Contributions or Gifts by Individuals", which is indexed under Sec. 23(o) of the Code, subsection (o) being "Charitable and other contributions."²⁰

²⁰ Contributions by corporations fall under subsection (q) of Section 23 of the Code, "Charitable and other contributions by

Subsections (a)(1) and (o) of Section 23 of the Code deal with entirely different matters. The first has to do with deductible business expenses, the second deals with deductible contributions by persons who do not have to be in business at all to obtain the deduction. Under Section 23(a)(1), an expenditure in order to be deductible must be incurred in carrying on a trade or business, and must additionally be ordinary and necessary; under Section 23(o)—and under Section 23(q)—there is no requirement that the contribution be an ordinary and necessary expense incurred in the course of operating a business.

Both Sections 23(o) and 23(q) limit the character of the recipients to whom a contribution when made is deductible; the donee must be an organization "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

This proviso first appeared as a part of Sec. 23 (o)(2) in the Revenue Act of 1934, and as a part of what was added to that Act as Sec. 23(r) by § 102(c) of the Revenue Act of 1935. In the Revenue Act of 1936 the latter provision, relating to corporations, was renumbered Sec. 23(q).

When the proviso was first enacted, Congress was acutely aware of the existence of organizations whose primary purpose was the dissemination of propaganda under the guise of being charitable, religious, and educational in nature, and its objective was to deny deductibility to propagandist organizations. Amendment

corporations." For present purposes, nothing turns on the distinction between individual and corporate taxpayers. Sections 23(o) and 23(q) of the 1939 Code are now combined as Section 170 of the 1954 Code.

No. 19, 78 Cong. Rec. 5861, 5959, 7816, 7821, 7831. It is on this basis that contributions to a political party are not deductible. Section 23(a)(1)(A) was not mentioned, for the obvious reason that the proviso as a part of Sec. 23(o), contributions, involved considerations wholly unrelated to Sec. 23(a)(1)(A), which dealt with business expenses. Section 23(o) dealt with the activities of the organization receiving money, Section 23(a)(1)(A) with the business activities of the person or organization spending money. And the portion of the regulation now in question (quoted at R. 136) was first inserted in 1938 as Treas. Reg. 101, Art. 23(o)-1, "Contributions or gifts by individuals."

In the *Textile Mills* case, the regulation relating to lobbying by corporations had a long history, see 314 U. S. at 337-338; the regulation was moreover supported by well recognized and established considerations of public policy; and the Court characterized as "frivolous" the taxpayer's contention that in those circumstances the regulation was inapplicable because indexed under a section of the act other than the one dealing with business expenses. We do not question the characterization as applied in those circumstances. But the issue under the present heading is not whether the regulation that is in question in the present case was applicable, it is not whether it would be valid as an original question, it is rather the very much more narrow inquiry as to whether this particular regulation can be deemed to have been reenacted by Congress.

It may be that the conscientious Congressman is as fictitious a character as the reasonable man. The standard both represent is real nonetheless. We ask, therefore, if a conscientious Congressman, faced with the bill that became the Internal Revenue Code of 1939, had sought to ascertain from the latest Treasury Reg-

ulations available, Treas. Reg. 101 of 1938, the meaning of "ordinary and necessary" business expenses in draft Section 23(a)(1), would he have looked to Art. 23(o)-1 of those regulations, entitled "Contributions or gifts to individuals", in order to find that meaning? And, if he had, would it ever have occurred to him that sums expended by a businessman in the course of legitimate activity designed to defeat legislation that would have destroyed his existing business were not deductible as ordinary and necessary business expenses by reason of the fact that contributions by taxpayers whether in business or not were not deductible when made to organizations that in substantial measure were engaged in opposing legislation?²¹

Unless both of these questions can be answered with a resounding affirmative—and of course neither can be—any talk of reenactment is just that—talk.

C. It is even more clear that there has been no reenactment of the regulation denying deductions for legislative expenses in its application to legislation enacted directly by the people without intervention of a legislature.

A fortiori, there has never been any regulation specifically mentioning expenditures made in respect of legislative measures submitted directly to the people by way of initiative, referendum, or constitutional amendment. In this field, even the prerequisite of

²¹ The regulation was numbered Sec. 23(o)-1, thus being indexed under the section of the Internal Revenue Code dealing with charitable contributions. As a glance at that regulation will show, the provision prohibiting expenses for lobbying and the promotion or defeat of legislation was buried in the midst of lengthy and detailed provisions dealing with charitable contributions. The same comment can be made regarding the regulation as it stood when the present controversy arose; see pp. 67-69, *infra*.

the reenactment doctrine—"regulations and interpretations long continued without substantial change" (*Helvering v. Winmill*, 305 U. S. 79, 83)—is lacking.

For, far from there being any long continued, consistent course of administrative holdings that the word "legislation" in the regulation includes measures enacted by direct vote of the people, the Tax Court held that a taxpayer could deduct as a business expense sums paid to further the adoption of a constitutional amendment—direct legislation by the people—which he believed would increase his business. *Luther Ely Smith*, 3 T. C. 696. Moreover, as has been seen, the Commissioner for fourteen long years publicly acquiesced in that holding.

That acquiescence, published in the light of the *Textile Mills* decision which preceded *Luther Ely Smith* by more than two years, not only negatives any possible application of the enactment doctrine to support the ruling below, but actually requires reversal of the decision now under review by virtue of that precise doctrine.

Indeed, we submit that it is not open, even to the Government, to urge that its position is supported by reenactment on the footing of "regulations and interpretations long continued without substantial change," and simultaneously to put forward the Commissioner's delayed-action doctrinal somersault by way of additional argument.

It is plain that, under the present heading (Point III C), there is no scope for the reenactment doctrine. Only two rulings have been found—other than those now under review in this Court—where it was held that expenses incurred in connection with a referendum for the continuance or non-continuance of a busi-

ness dependent on periodic popular approval were non-deductible. *Revere Racing Association v. Scanlon*, 232 F. 2d 816 (C. A. 1) (dog racing); *Herbert Davis*, 26 T. C. 49 (liquor business). Both date from 1956, and so followed by many years the basic 1939 Act on which petitioners here rest their case. They are thus plainly insufficient to permit invocation of the doctrine of reenactment. For the rest, as this Court said (*Jones v. Liberty Glass Co.*, 332 U. S. 524, 534), "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."

Consequently, as we said in our Petition, any talk of "reenactment" in the present connection must be dismissed as sheerest fiction.

IV. Petitioners Sufficiently Proved That Passage of the Proposed Initiative Measure, Which Would Have Closed All Retail Stores for the Sale of Beer, Would Have Impaired Their Wholesale Business to the Point of Probable Destruction.

Little time need be spent on the alternative ground of affirmance espoused by the court below (R. 138-139), to the effect that petitioners failed to prove that the passage of the initiative measure here in question would have impaired their business to the point of probable destruction. Indeed, we cannot forbear the observation that, if there had been any substance to the alternative ground, this Court would scarcely have considered that the substantive questions presented by the Petition for Certiorari were in a posture that warranted review.

First. The only oral testimony in the record on the effect of the initiative came from Adwen, Secretary of the Washington Beer Wholesalers Association (R. 75), who testified (R. 76-77):

"A. Initiative 13 primarily would have in the opinion of the industry—I think I can safely say industry—would have made it necessary to distribute beer and wine through state liquor stores which would have automatically put the taverns and the grocery stores handling beer and wine out of business. At the same time it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business. I don't say a 100 per cent for this reason. It would still probably be necessary for some of the breweries to have representatives to call upon the Liquor Board to sell their merchandise and their wares, but at least 90 per cent of them would have had nothing to do so they would have gone completely out of business."

In view of the terms of the initiative (R. 93-96), which would have given the State of Washington a monopoly of all beer retailing, which would have repealed all existing statutes relating to beer retailing, and which would have revoked all existing licenses to sell beer at retail, it is plain that petitioners—beer wholesalers—would have been forthwith deprived of all their existing customers. Yet despite the terms of the initiative, and despite Adwen's uncontradicted testimony, the district court found as a fact that (Fdg. 9, R. 46):

"9. There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear. In any event, the measure was defeated."

The court below, quoting the foregoing, called it (R. 139) "a finding that appellants failed to sustain

their burden of establishing by a preponderance of the evidence that the passage of the initiative would have impaired its business as a beer distributor."

Second. It is obvious from the foregoing that both courts have been thinking in terms of words rather than of actualities, and that by concentrating on the textual differences between the word "retail" and the word "wholesale", they both quite lost sight of the commercial nexus that links the two in the business world. In the context of trade the two imply a relationship, just as "buyer" and "seller", separate words, are joined in the transaction of sale.

The relationship between wholesale and retail is not obscure or mysterious; on the contrary, it is a commonplace of merchandising. "Wholesale" by dictionary definition is "the sale of commodities in large quantities, as to retailers or jobbers rather than to consumers directly (opposed to *retail*)."²² *The American College Dictionary* (Barnhart ed. 1947) 1393. "It is the character of sales to the trade that makes and distinguishes a wholesaler." *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365, 366-367 (C. A. 2); see also *Roland Co. v. Walling*, 326 U. S. 657, 673-74.²²

A wholesaler, accordingly, is one who sells to retailers. He can lose his business in one of two ways, either by having his own establishment closed or by having his customers' establishments closed. Either act effectively terminates his business. Obviously, when retail stores are closed, wholesalers have lost their trade for want of customers, and in this instance 90% of the wholesalers would have been out of busi-

²² Sometimes, of course, "wholesaler" is more narrowly defined (e.g., 26 U. S. C. §§ 4731(d), 5112), but such formulations are irrelevant in the present context.

ness. And under the terms of the initiative (R. 93-96) they could not have transformed their business from wholesaling to retailing, because that provided for all beer retailing to be done by the State of Washington.

All the above is really so pikestaff plain that it is within the realm of judicial notice, for what has just been said is a part of "the general customs and usages of merchants" (*Brown v. Piper*, 91 U. S. 37, 42) that will be so noticed, and is moreover quite as obvious as the proposition involved in the cited case, *viz.*, that a freezer which can freeze ice cream can likewise freeze fish.

The alternative holding of the court below, once it is subjected to just a moment's thought becomes—and is—utterly untenable.

Third. But if more technical grounds are necessary, they can easily be supplied; Finding 9 of the district court (R. 46), on which the court of appeals relied (R. 138-139), is doubly deficient by accepted standards of judicial administration.

1. In view of the Adwen testimony, quoted above at p. 60, and of the terms of the initiative (R. 93-96), Finding 9 is "clearly erroneous" within Rule 52(b), F. R. Civ. P., under the standard of *United States v. United States Gypsum Co.*, 333 U. S. 364, 395: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Here, of course, there was no evidence contradicting or even qualifying Adwen's testimony or the scope of the initiative provisions in any way.

2. The doctrine of judicial admissions similarly impairs Finding 9.

On the day of the trial, the Government filed a trial memorandum with the district court that stated in part (R. 18), "Concededly, Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely." In his opening statement, Government counsel sought to qualify or withdraw this concession (R. 73-74). But the law is that a judicial admission, once made, can only be withdrawn on a showing that what was admitted could not in any circumstance be true. See *L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.*, 253 Fed. 914, 917-918 (C. A. 7), certiorari denied, 248 U. S. 580; *Oscanyan v. Arms Co.*, 103 U. S. 261, 263-264; 9 Wigmore, *Evidence* (3d ed. 1940) §§ 2588, 2590, 2591. No such showing, plainly enough, can be made; and certainly no such showing was attempted to be made.

Fourth. In this Court, it was for the first time urged that the deficiency in proof lies in the circumstance that petitioners did not show that they would have been among the 90% of the wholesalers who would have gone completely out of business according to Adwen's testimony. The Government said, referring to that testimony (Br. Op. 10-11), "This general statement, however, falls far short of demonstrating that the taxpayers themselves would have suffered, particularly in view of the same witness' admission (R. 76-77) [quoted *supra*, p. 60] that some of the wholesale distributors would still be required to have representatives call upon the State Liquor Board to sell their merchandise."

But the short answer to the foregoing is that a taxpayer who incurs expenses in attempting to save his business from destruction is not required to prove to a mathematical certainty that this would have hap-

pened. It is sufficient that the business was "threatened with complete destruction", *Commissioner v. Heininger*, 320 U. S. at 472, and that the expenditures made "are the common and accepted means of defense against attack." *Welch v. Helvering*, 290 U. S. at 114. Not only is the Government's newly generated position, that total destruction must be proved for a taxpayer to avail himself of the *Heininger* doctrine, without support in reason, it is also contrary to the authorities as to the deductibility of legal expenses incurred in defending criminal prosecutions and suits seeking penalties. There, as we have seen, *supra* pp. 22-23, the present case law is that such expenses are deductible if the defendant prevails but not if he loses.

Otherwise stated, the weaker the Government's case and the less the possibility of losing one's livelihood in consequence of prosecution, the greater the chance of deducting the expenses incurred in defending. Yet here the Government now seeks to rest non-deductibility on the fact that on the evidence there was only a 90 rather than a 100 per cent chance of petitioners being put out of business.

It is not necessary to labor the point. We submit that in the context of the statute, it is just as ordinary, and just as necessary, to avert a 90% possibility of the destruction of an income-producing enterprise as it is to avoid a 100% certainty of such destruction.²³

²³ The same reasoning disposes of the last sentence of Finding 5 (R. 46), "In any event, the measure was defeated." Under the cases dealing with the deductibility of expenses incurred in defending criminal prosecutions, success for the defendant makes an *a fortiori* case for deductibility and not the contrary, as the quoted sentence appears to imply.

Fifth. Finally, the Government says (Br. Op. 11), "The initiative measure, it should be noted, was not a prohibition measure, but only a measure designed to have beer and wine sold through state-owned stores." The relevance of that observation is not perceived; the question here is simply as to the effect of the initiative on petitioners' business. Since, plainly, it had a 90% chance of closing that business, its scope or lack of scope beyond that is obviously without bearing here.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the cause remanded with directions to enter judgment for the petitioners in the amount prayed for.

Respectfully submitted.

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AUGUST 1958.

APPENDIX

**Statute, Regulation, and State Constitutional Provision
Involved**

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 provides in pertinent part as follows:

“§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

“(a) Expenses.

“(1) Trade or Business Expenses.

“(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.”

2. Section 29.23(o)-1 of Treasury Regulations 111, as it existed during 1948, was as follows:

“Sec. 29.23(o)-1. Contributions or Gifts by Individuals.—

“A deduction is allowable under section 23(o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A deduction is not allowable, however, for the actual payment of a contribution or gift if the amount of such payment already has been deducted on the accrual basis in computing net income for any taxable year beginning before January 1, 1938. A contribution or gift to an organization described in section 23(o) is deductible even though some portion of the funds of such organization is or may be used in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162). For computation of deductions for charitable contributions where the taxpayer also has an allowable deduction for medical expenses, see section 29.23(x)-1.

“A contribution or gift to the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any possession of the United States exclusively for public purposes, is deductible.

"No reduction is allowed in computing the net income of a common trust fund or a partnership for contributions or gifts made to organizations described in section 23(o). (See sections 169 and 183.) However, a partner's proportionate share of contributions or gifts actually paid by a partnership during its taxable year to such organizations may be allowed as a deduction in his individual personal return for his taxable year with or within which the taxable year of the partnership ends, to an amount which, when added to the amount of contributions made by the partner individually and claimed as a deduction, is not in excess of 15 percent of his adjusted gross income, or, for taxable years beginning prior to January 1, 1944, 15 percent of his net income computed without the benefit of the deduction for contributions. In the case of a non-resident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213(c) and 251. For contributions or gifts by corporations, see section 29.23(q)-1.

"In the case of husband and wife making a joint return, the deduction for contributions or gifts is the aggregate of such contributions or gifts made by the spouses, and is limited to 15 percent of the aggregate adjusted gross income of the spouses or, for taxable years beginning prior to January 1, 1944, 15 percent of the aggregate net income of the spouses computed without the benefit of the deductions for contributions.

"A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

"Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

"If the contribution or gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the contribution or gift.

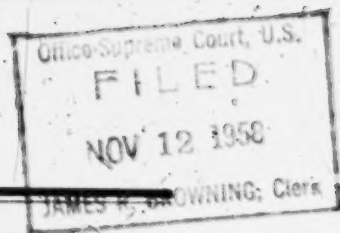
"In connection with claims for deductions under section 23(o), there shall be stated in return of income the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift in each case. Claims for deductions under section 23(o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary."

3. Amendment 7 to the Constitution of the State of Washington, adopted in November 1912, provides in pertinent part as follows:

"Art. 2 § 1. LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

"(a) Initiative: The first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are

filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measure shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case, the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law."



IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. 29

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, Petitioners,

v.

UNITED STATES OF AMERICA;

**On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit**

PETITIONERS' REPLY BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 29

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

The alternative holding of the court below was that petitioners had failed to prove that passage of the initiative measure here in question would have destroyed their business (R. 138-139). The Government no longer makes any effort to support that holding. Accordingly, as the case is now postured, it is plain that passage of the initiative would have put these tax-

payers out of business. Yet the Government's arguments reflect a studied refusal even to recognize the existence of that consequence, which is the central fact in the present case. Petitioners' reply is accordingly far more lengthy than it would have been had the Government fairly faced the basic issue presented.

1. The Government's Contention That the Expenditures Incurred by Petitioners in Opposing the Initiative Measure in Question Are Not Deductible as "Ordinary and Necessary" Business Expenses Utterly Ignores the Controlling Fact—Now No Longer Disputed—That Passage of That Initiative Measure Would Have Destroyed Petitioners' Business.

A. The Government's brief is completely and unwarrantably silent regarding the effect of the initiative measure that petitioners opposed.

1. The basic issue in this case, as presented in the petition for certiorari (Question 1, Pet. 2) and as repeated in petitioners' brief-in-chief (Question 1, Pet. Br. 2), is whether the expenditures made by petitioners to defeat an initiative measure that would have destroyed their business may be disallowed by the taxing authorities in the face of Sec. 23(a)(1)(A), I.R.C. 1939 (Pet. Br. 67; U. S. Br. 55) which permits deductions of, "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

Petitioners' Point IA (Pet. Br. 15-20) was that "Sums spent in an endeavor to protect a taxpayer's business from destruction are deductible as ordinary and necessary business expenses." Many cases were cited, and *Commissioner v. Heininger*, 320 U. S. 467, was heavily relied on, there and throughout petitioners' argument. Despite all this, it will still be well nigh impossible for one not yet acquainted with the case, who

at the outset reads only the Government's brief, to learn that the initiative measure which petitioners spent money to oppose had any effect on their business, much less that it would have destroyed that business.

2. The question as posed by the Government (U. S. Br. 2) is:

"Whether taxpayers' payments to organizations established to finance publicity campaigns aimed at defeating proposed initiative legislation in the States of Washington and Arkansas' are deductible as 'ordinary and necessary' business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939."

That formulation, very plainly, does not correctly or truly present the question; instead, it only begs that question.

A similar avoidance of the issue infects the opening sentence of the Government's statement (U. S. Br. 3):

"These cases involve the question of deductibility, as 'ordinary and necessary' business expenses, of sums paid by the respective taxpayers to organizations established to finance publicity programs designed to defeat initiative proposals in the States of Washington and Arkansas."

We submit that it would be difficult, either as an original proposition or otherwise, to fashion language better calculated to conceal from the reader the primary issue that is to be decided by this Court.

¹ The case of *F. Strauss & Son, Inc. v. Commissioner of Internal Revenue*, No. 50, this Term, involves an Arkansas corporation, engaged in the wholesale-liquor business, that made expenditures to oppose an Arkansas initiative petition which called for a state-wide prohibition act.

3. The leading case permitting the deduction as "ordinary and necessary" business expenses of sums paid by a taxpayer to preserve an existing business from destruction, *Commissioner v. Heininger*, 320 U. S. 467, which petitioners discussed at length and cited throughout their brief, is neither stated nor discussed by the Government, and is only incidentally cited in the Government's brief—twice as a "compare" and once as a "see also" (U. S. Br. 18, 24, 26).

Had *Heininger* never been decided, the Government's position here would be substantially stronger. Similarly, if petitioners' expenditures here had been aimed at an initiative measure other than one which would have destroyed their business, the Government's position here would likewise be stronger.

As matters stand, however, the Government ignores both the controlling fact and the controlling decision involving that fact. The result is that, by comparison with the Government's brief in this case, the previous extreme example of distorting expurgation—Hamlet without the Prince of Denmark—stands as an instance of stark, uncompromising realism.

Petitioners would, we submit, be fully justified in complaining that parties to litigation should not be required to assume the burden of filing a reply brief to correct a distortion as gross as the one that permeates the Government's brief. For present purposes, however, it is sufficient to point out that the Government's failure to face the real issue emphasizes the weakness of its position and the lack of foundation for its arguments.

B. The Government no longer attempts to support the alternative holding of the court below that petitioners had failed to establish that the initiative measure would have destroyed their business.

The court of appeals found alternative support for its denial of petitioners' deduction in its holding (R. 138-139) that petitioners failed to establish that passage of the initiative would have impaired their business.

This holding was assigned as error here (Question 3, Pet. 2; Question 3, Pet. Br. 2), it was argued by both sides when the case was pending on petition for certiorari (Pet. 14-15; Br. Op. 10-11), and it was extensively argued by petitioners in their brief on the merits (Pet. Br. 59-65).

Petitioners' position was that, of course, a measure that closes all retail stores save only the State's necessarily destroys all wholesalers' business, and that any other view is demonstrably untenable.

The Government apparently agrees, for it has abandoned its prior support of the alternative holding (Br. Op. 10-11), and now makes no attempt whatever to sustain that holding. Even the fact that there was an alternative holding is relegated to a footnote (U. S. Br. 5, note 2).

Thus both parties are now agreed that the initiative measure, if passed, would have destroyed petitioners' business. In view of that agreement, there is accordingly even less excuse for the Government to avoid and ignore, in a case involving business expenses, the business effect of the threat at which the expenditures were directed.

C. Whatever the merits of the alleged policy against "public subvention" of activities designed to influence legislation as an argument in vacuo, it is inapplicable to such activities when directed towards preventing the destruction of an existing business.

The Government argues at great length (U. S. Br. 27-37) that the Treasury regulation relied on by the courts below to deny petitioners their deduction "is in accord with the long-established Congressional policy against 'public subvention' of political pressure activities to influence legislation." Here also, the Government's arguments proceed without any regard to the fact that the "legislation" involved in the present case would have destroyed the business of those taxpayers.

Petitioners do not quarrel with the view that, if they had been individuals whose business had not stood to be affected by the passage of the initiative measure in question, they would not have been permitted a deduction in respect to the expenditures now in issue. In that event, those expenditures would not have been among "the ordinary and necessary business expenses paid or incurred during the taxable year in carrying on [their] business." Sec. 23 (a) (1) (A), I.R.C. 1939 (Pet. Br. 67). Indeed, in that event those expenditures would not have been business expenses in any sense.

Nor do these petitioners quarrel with the view that if, not being in the business of beer wholesaling, they had made expenditures in an effort to defeat Initiative Measure No. 13, they would not have been able to deduct those payments as contributions within Sec. 23(o), I.R.C. 1939 (U. S. Br. 55); the terms of the statute, which specifically deny a deduction for contributions to organizations "no substantial part of the

activities of which is * * * attempting, to influence legislation, as well as the terms of Treas. Reg. 111, Sec. 29.23(o)-1 (Pet. Br. 67-69), which repeat the statutory language, forbid. But no such language appears in the business expense section, and the regulation here relied upon by the Government is indexed under and thus tied to the contribution section of the Code.

A taxpayer seeking a deduction as a contribution need not be in business to avail himself of the provisions of Sec. 23(o). That section has nothing whatever to do with business expenses. The deductibility of business expenses, allowed by Section 23(a), turns on the activity of the taxpayer making the payment, whereas the deductibility of contributions, permitted by Section 23(o), depends on the activity of the recipient of the payment and not in any sense on the activity of the taxpayer making the payment. The latter factor is significant only in respect of Section 23(a) deductions. But the specific statutory and regulatory language invoked by the Government—"Sums of money expended for * * * the promotion or defeat of legislation"—appears neither in the business expense section nor in any regulations associated with that section.

We submit that the plain and indeed inescapable inference from the difference in statutory language is that Congress did not intend the clause with which it limited permissible contributions to apply to business expenditures that were in other respects "ordinary and necessary." Here, since the "legislation" in question would have destroyed petitioners' business, their expenditures aimed at preventing such destruction were deductible as a matter of law under the rule of *Commissioner v. Heininger*, 320 U. S. 467—a decision whose impact the Government apparently hopes somehow to avoid by according it silent treatment.

Petitioners do not think it necessary to repeat what is already set forth at pp. 54-56 of their brief-in-chief. It is sufficient simply to add that there is no warrant either in the language of the Code or in its legislative history for writing into the business expense provision, Sec. 23(a), any of the substantive limitations on deductible contributions that are found in Sec. 23(o), any more than there is for limiting the percentage of deductible business expenses that will be allowed under Sec. 23(a) by the percentage limitation on contributions that appears in Sec. 23(o).²

The Government's "public subvention" argument is climaxed by the following paragraph (U. S. Br. 36) :

"Suppose, for example, that a citizens' organization had been established in the State of Washington for the purpose of financing a campaign *supporting* the initiative proposal involved in No. 29 to limit the sale of wine and beer to state-owned stores. Contributions to that organization would not be deductible. But, under taxpayers' construction, the liquor industry could deduct without limit their payments to organizations *opposing* the same measure." [Italics in original.]

The answer of course is that the members of a citizens' association supporting the initiative proposal could not for a moment claim that such support constituted an expense necessary or even incidental to their normal business. Similarly, no citizens' association,

² Sec. 23(o) provides, in its last paragraph, that deductions are allowed for contributions only in "an amount which in all the above cases combined does not exceed 20 per centum of the taxpayer's adjusted gross income." There are similar percentage limitations in Sec. 23(p)(1)(A) and in Sec. 23(a)(1)(B), but none in the basic business expense provision here involved, which is Sec. 23(a)(1)(A).

as such, opposing the proposal, could show any business connection in their opposition. Individuals who might oppose the initiative because they wanted to continue to frequent taverns, or because as devotees of free enterprise they disliked the extension of State entry into an additional retail business, or because they objected on principle to any further restrictions on beverage transactions, would likewise be unable to bring their contributions within Sec. 23(a)(1)(A), since, obviously, their opposition would have no business flavor.

Only beer and wine retailers and wholesalers could qualify under the cited section, since only those groups could show an impending destruction of their several businesses. (The Government is in error, incidentally, in speaking (U. S. Br. 36) of "the liquor industry"; there is none in Washington; the State conducts all alcoholic beverage transactions except in wine and beer. See Washington State Liquor Act, c. 62, Laws of 1933, Extra. Sess., now Wash. Rev. Code, Title 66, Alcoholic Beverage Control; see Chapter 66.16, State Liquor Stores).

It is therefore arguing wide of the mark to invoke "a tax equilibrium" (U. S. Br. 36), to seek to compare large and small businesses (U. S. Br. 36-37), or to attempt to set business against labor is still another context (U. S. Br. 36). The only persons or corporations which are free to claim their contributions against this particular initiative as business expenditures are those whose business would have been affected thereby. That would include petitioners, individual taxpayers engaged in beer wholesaling; it would include corporate taxpayers so engaged; it would include any individual or corporation engaged in beer retailing;

and, necessarily, it would include any individuals employed by the foregoing, since such individuals would stand to lose their jobs if the measure were adopted.

Otherwise stated, those whose business or livelihood would be destroyed by the initiative measure may deduct as ordinary and necessary business expenses any sum expended by them to defeat the measure and thus to prevent such destruction. Those whose business or livelihood would not be similarly affected may not take such deductions, and it is entirely irrelevant to any issue in this case to set forth what the consequences of allowing the deductions to this large and non-eligible group might be. Yet the Government's arguments are addressed to the non-eligibles, and studiously avoid the situation of the small eligible group in which petitioners here are included.

The short of the matter is that the Government's arguments are directed to a state of facts that is not presented by this case, and that those arguments ignore the only factual situation which is presented.

The passage of an electric current through a vacuum results in oscillations that have brought us the X-ray, the radio, and television. But the passage of a legal argument through a vacuum produces only unhelpful obfuscation.

II. The Textile Mills Case Involved Lobbying, and Applies Only to Lobbying.

Humpty Dumpty said, "When I use a word, it means just what I choose it to mean—neither more nor less." Consideration of the Government's reading of *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, strongly suggests that it cites that case throughout in the Humpty-Dumpty manner.

The Government says (U. S. Br. 22), summarizing an extended argument, "Viewing *Textile Mills* in its true light, it becomes apparent that the decision involved no activities which might be characterized as 'lobbying' in the sense of direct dealings with legislators." If that were so, it is indeed difficult to understand the *Textile Mills* opinion.

Here is an excerpt from the Board of Tax Appeals' opinion (32 B.T.A. at 625):

"F. W. Mondell, an attorney and a former member of Congress, was employed in connection with the preparation and making of proposals and suggestions to members of Congress, 'the aim of which was to promote the speedy passage of the desired legislation.'"³

Moreover, this Court dealt with the case on the footing that lobbying in the sense of solicitation of individual legislators was involved. E.g., (314 U.S. at 338); "Contracts to spread such insidious influences through legislative halls have long been condemned." That passage simply does not make sense if, as the Government urges (U. S. Br. 22), *Textile Mills* "involved no activities which might be characterized as 'lobbying' in the sense of direct dealings with legislators." Moreover, if *Textile Mills* had been thus limited, then the Court's citations, of *Trist v. Child*, 21 Wall. 441, and *Hazleton v. Sheckels*, 202 U. S. 71, immediately after the sentence just quoted from its opin-

³ The same passage appeared in virtually the same words in the opinion of the Third Circuit (117 F. 2d at 63):

"Mr. Mondell, who is an attorney and a former member of Congress, was employed by the taxpayer to make proposals and suggestions to members of Congress to promote the speedy passage of the desired legislation."

ion, would have been wholly inapposite. Those were lobbying cases, and they were cited because, very plainly, this Court considered that *Textile Mills* involved lobbying.

Nor is the Government on sounder ground when it argues (U. S. Br. 23-24) that "The *Textile Mills* decision was not based on the illegality of any contract," quoting from the opinion the sentence (314 U. S. at 338-339) reading "Whether the precise arrangement here in question would violate the rule of those cases is not material."

In one of the cases cited, *Hazleton v. Sheckels*, 202 U. S. 71, 79, the Court had said:

"* * * whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations and it intensified the inducement by the contingency of the reward."

But the full opinion in *Textile Mills*, taken in the setting of what this Court held in cases involving legislative activity but not lobbying, shows that *Textile Mills* necessarily turned on the line between legality and illegality. This Court said (314 U. S. at 339):

"There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy [i.e.,

of *Trist v. Child* and *Hazelton v. Sheckels*, *supra* in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction."

If that sentence does not plainly convey the view that the line turns on the legality of the contract in question, then the English language has suddenly become defective as a medium of communication. There can be no mystery about what was intended. The holding is that the regulation may properly define the statutory phrase "ordinary and necessary" in terms of what is legal. Lobbying is illegal, or at least so violative of public policy as to make contracts for lobbying unenforceable (*Marshall v. Baltimore & O. R. Co.*, 16 How. 314; *Trist v. Child*, 21 Wall. 441; *Hazelton v. Sheckels*, 202 U. S. 71), and therefore a regulation denying deductions for expenditures involving lobbying may be supported.

On the other hand, contracts providing for legitimate legislative activity are enforceable, even when contingent in nature (*Trist v. Child*, 21 Wall. 441, 450; *Spalding v. Mason*, 161 U. S. 375; *Nutt v. Knut*, 200 U. S. 12; *McGowan v. Parrish*, 237 U. S. 385; *Winton v. Amos*, 255 U. S. 373; *Steele v. Drummond*, 275 U. S. 199), and therefore a regulation purporting to declare that expenditures under contracts for legitimate legislative activity which in every other respects qualify as ordinary and necessary business expenses are to be denied deductibility, is purely arbitrary. Such a regulation is as invalid as the one considered in *Bingham's Trust v. Commissioner*, 325 U. S. 365, that attempted to deny deduction for a particular class of expenses otherwise within the language of the statute.

Comparison of two cases decided at the same Term—*Nutt v. Knut*, 200 U. S. 12, with *Hazelton v. Sheckels*, 202 U. S. 71—shows that when there is no lobbying the contract is enforceable even though contingent, whereas where solicitation of legislators is involved, the very tendency is sufficient to condemn the arrangement. Significantly enough, only the latter case was cited and relied upon in *Textile Mills*.

The nub of the matter is, not only that *Textile Mills* fairly read necessarily turns on the illegality of what was there involved, but that there is no automatic illegality for any and all activity connected with legislation. The vice of the Government's argument is that it attempts to attribute illegality to every dealing with legislation. There is simply no support in the authorities for any such view. See, e.g., *Steele v. Drummond*, 275 U. S. 199, 203. Accordingly, a regulation which attempts, either in text or in context, to disallow what would otherwise be ordinary and necessary business expenses simply because they involved legislative activity is invalid because in conflict with the statute. A close parallel is *Bingham's Trust v. Commissioner*, 325 U. S. 365, where this Court held invalid a regulation that attempted to deny deduction for "Expenses incurred * * * for the purpose of resisting a proposed additional assessment of taxes" in the face of a statute permitting deduction of "ordinary and necessary expenses paid or incurred for the * * * conservation or maintenance of property held for the production of income." For where expenditures are as clearly ordinary and necessary as in *Heininger*—which was cited in *Bingham's Trust*, 325 U. S. at 376—then the latter case teaches that not even an express barrier erected by the Treasury by way of regulation can impair or

diminish the Congressionally granted deduction of such expenditures.

It was purely arbitrary in *Bingham's Trust* to exclude expenses of resisting an additional tax assessment from the ordinary and necessary non-business expenses that Congress had declared to be deductible; it is equally arbitrary to exclude the expenses of opposing legislation that would have destroyed the taxpayer's business from the ordinary and necessary business expenses declared deductible here by the statute as interpreted in *Heininger*.

We do not for a moment contend, as the Government seems to think (U. S. Br. 49), that the words "the promotion or defeat of legislation" in the regulation are surplusage. Our position is that that portion of the regulation is invalid. Our position is that when expenditures are "ordinary" because incurred to save an existing business from destruction, and "necessary" because made under arrangements that by an unbroken line of decisions are legal, enforceable, and not in contravention of any public policy, a regulation which attempts to carve out of the statute a particular class of expenditures meeting both those requirements is arbitrary, unreasonable, in conflict with the basic statute, and hence invalid.

In sum, we submit that when *Textile Mills* is read in context, it is shown not only to involve lobbying, but also shown not to extend beyond lobbying. The carefully chosen language in which that decision is couched would otherwise be, if not meaningless, at least obviously inappropriate.

We are aware that *Textile Mills* has on occasion been more broadly construed by the lower courts. See, e.g.,

U. S. Br. 24-25. Many of the cases there cited are plainly distinguishable on their facts. But, to the extent that they are not, they can hardly be regarded as even persuasive here as to just what this Court held. Significantly enough, as we have heretofore pointed out (Pet. Br. 34-35), this Court has always cited *Textile Mills* as a lobbying case. See *Lilly v. Commissioner*, 343 U. S. 90, 95; *Commissioner v. Heininger*, 320 U. S. 467, 473.

III. In Any Event, the Government's Effort to Equate an Initiative Measure With the "Legislation" Dealt With in the Regulation Ignores the Substance of the Struggle Over the Initiative, and Would Moreover Raise a Serious Constitutional Question.

Alternatively, even if the regulation here in question had validity as applied to what is "legislation" in the usual sense of a law passed by a legislative body, it cannot be applied to an initiative measure, which is legislation enacted by the people; and any attempt to do so would raise a serious constitutional issue.

A. The distinction between legislation by a legislature and legislation by the people is the basic one which underlay the struggle for the adoption of the initiative, and cannot be verbalized or trivialized away as the Government seeks to do.

Under the present heading, the Government abandons the technique of Humpty-Dumpty in favor of the logical processes of the late Gertrude Stein; its position (U. S. Br. 42-46) is that "legislation is legislation," and that there is accordingly no difference between legislation enacted by a legislature and legislation enacted by the people under initiative provisions. The latter, says the Government (U. S. Br. 43), "is plainly an exercise of legislative power and the

product cannot be considered as anything other than legislation," citing six state cases.

Those decisions are not very helpful in the present connection. One of them (*Opinion of the Justices*, 118 Me. 544, 107 Atl. 705) holds that the joint resolution of the Maine Legislature which ratified the Eighteenth Amendment to the Federal Constitution did not need to be submitted to the people under the initiative and referendum provisions of the Maine Constitution—a result that would follow in any event from Article V of the Federal Constitution. Another (*Dawson v. Tobin*, 74 N. D. 713, 24 N. W. 2d 737) dealt not with the initiative but with the effect of a referendum: Where a repealing act passed by the legislature is submitted to the people on referendum and is there defeated, does such defeat revive the repealed act in the face of a statutory provision that the repeal of a repealer does not operate as a revivor? It is hardly necessary to argue at length the unhelpfulness of the answer to that question in any present connection.

The other four cases (*Wallace v. Zinman*, 200 Cal. 585, 254 Pac. 946; *Commonwealth v. Higgins*, 277 Mass. 191, 178 N.E. 536; *Kadderly v. Portland*, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; *Senior Citizens League v. Department of Social Security*, 38 Wash. 2d 142, 228 P. 2d 478) all hold that initiative measures are subject to constitutional limitations. Any other view, of course, would open the door to intolerable popular tyranny. But the decisions go on diverse grounds. In Massachusetts the initiative provision, Article 48 of the Amendments to its Constitution, specifically provides that "The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder."

In California, the court held that the constitutional provision requiring all legislative bills to have their subject-matter expressed in their titles operated to render void a portion of an initiative measure not so expressed (*Wallace v. Zinman*, 200 Cal. 585, 254 Pac. 946, *supra*), while in Washington the holding was that a similar constitutional provision was applicable only to the titles of legislative bills and not to the ballot titles of initiative measures. Indeed, the Supreme Court of Washington pointed out that "No act passed by the people of this state has ever been declared unconstitutional because of a defective legislative title." *Senior Citizens League v. Department of Social Security*, 38 Wash. 2d 142, 173, 228 P. 2d 478, 495.

In Washington, where the present case arose, there is accordingly a recognized constitutional difference between legislation passed by a legislature and an initiative measure passed by the people. But petitioners are not content to rest their case on that distinction. What is involved here is a difference far more basic, a difference in political structure, a difference that goes to the heart of government itself. The generation-long battle over the adoption of the initiative was fought out over that difference in more than half of the states of the Union.

Essentially, the struggle for the adoption of the initiative and the referendum, like the substantially contemporaneous struggle for the direct election of United States Senators that terminated in the ratification of the Seventeenth Amendment, reflected a deep-seated distrust of state legislators, and a belief in the superior virtues and lesser fallibility of the voters at large. Could the people safely trust their representa-

tives? Or must they in the last analysis rely upon themselves?

A competent critic phrased the matter thus (W. B. Munro, *Initiative & Referendum*, 8 Encyc. Soc. Sci. 50, 51):

"The chief reason for the spread of direct legislation in the United States is to be found in the impatience of the people with the work of their state legislatures. By reason of the lack of authoritative leadership, the persistent lobbying on the part of special interests and the intermittent control of legislative bodies by political bosses a great deal of dissatisfaction with the work of these legislatures developed during the closing years of the nineteenth century. People came to the conclusion that by their own direct action they could hardly do worse and might do better. Consequently they took into their own hands the power to make and to reject laws—not as a procedure for everyday use, but merely as a method to be used when the desired results could not be had in any other way."

The contest came to a head in 1912-1913. In 1912 the Seventeenth Amendment was proposed by Congress to the States, and many, many States amended their constitutions by adopting provisions for initiative and referendum. In the following year the Seventeenth Amendment's ratification put an end to the election of Senators by state legislatures, as Art. I, Sec. 3, had provided since the beginning.

These far-reaching changes in political structure constituted the people's answer: They would trust their legislators only to a point. Consequently, to urge, as the Government does, that a law passed by the people is in every sense the same as a law passed by the legis-

lature, is to trivialize into nothingness the subject-matter of a struggle that engaged state and national leaders over many years, and that succeeded in moving the center of power gravity in the governments of more than half of the States. To say that this was not a far-reaching change would be as unsound as to argue that the Seventeenth Amendment really amounted to very little because the individuals elected to office thereunder by popular vote are still United States Senators, just as much as those elected by state legislators were prior to 1913.

This very shift in gravity emphasizes what Theodore Roosevelt said in 1912 about the "prime duty of the people to free our Government from the control of money in politics" (Pet. Br. 40, note 14). The Government (U. S. Br. 46) urges that, if this was one of the objectives of the initiative, it has not been accomplished in the present case, pointing out that the Washington Beer Wholesalers' Association, Inc. expended \$231,257.10 for the program that assisted in defeating Initiative No. 13 (R. 46).

The Government's argument, far from minimizing the effect of initiative procedures, demonstrates the tremendous effect that those procedures have had.

In 1947, when the measure now in question was submitted to the Washington Legislature without action thereon (Fdg. 7, R. 45-46), that Legislature had 46 members in the Senate and 99 members in the House of Representatives—145 legislators in all. See Wash. Rev. Code, §§ 44.08.020, 44.12.020. Under pre-initiative conditions, the expenditure of close to a quarter of a million dollars might well have an appreciable effect on any legislation pending in the legislature, either on

that body generally, or on the cognizant committees, or on the chairmen of the committees. The contemporary pro-initiative literature is replete with references to "the legislative blackmailer." See Sen. Bourne of Oregon, quoted at Pet. Br. 40, note 13; see also other references cited Pet. Br. 40-41.

After ratification of the initiative amendment to the Washington Constitution (Pet. Br. 69-70), however, the situation became vastly different. Adoption or rejection of Initiative No. 13 involved winning the support of over half of the entire electorate of the State, and in 1948, the year in which that measure was defeated, there were some 905,000 voters who participated.⁴ With that number of voters, \$231,000 came to about 25½ cents per voter—and all of that sum was spent in trying to reach the voters' minds with arguments against the initiative that were disseminated in various forms of advertising by radio, mail, billboards, and the like (R. 115-116).

Thus the objective of the proponents of the initiative was attained. A sum which, on the lowest and most cynical level might suffice to influence key members of the legislature—or even the entire legislature—was plainly inadequate to corrupt the entire people. What Theodore Roosevelt was concerned about (Pet. Br. 40, note 14), "the control of money in politics," had become so diluted through the operation of the initiative that it had ceased to control.

Nor was there the slightest taint of illegality or impropriety in petitioners' appeal to the public. The district court specifically found that all they did was

⁴ This was a Presidential year, in which 905,059 voters cast their ballots. *World Almanac* (1958) 609.

proper (R. 29; Fdg. 11, R. 47). Their appeal was not in any sense within what this Court in *Textile Mills*, 314 U. S. at 338, condemned as an effort "to spread * * * insidious influences through legislative halls." And legitimate activity to influence legislation pending before the voters as distinguished from legislation pending before the ~~people~~ has never been deemed illegal. See *Restatement of the Law of Contracts*, § 559, quoted at Pet. Br. 49. What was here involved was an effort "to saturate the thinking of the community," which, as this Court has twice held, is not lobbying. *United States v. Rumely*, 345 U. S. 41; *United States v. Harriss*, 347 U. S. 612.

At this juncture, the Government asserts (U. S. Br. 50-51) that in the present case the people of the State of Washington were "the legislators themselves." This is truly Gertrude Stein with a vengeance; this contention verbalizes into nothingness a fundamental distinction, and in effect blots out some thirty years of history.

The essence of the battle for the initiative was that there was a difference between the individual voter and the individual legislator. The essence of the *Rumely* and *Harriss* cases is that there is a difference between an attempt "to saturate the thinking of the community" and an attempt to saturate simply the thinking of the members of the legislature, a difference so vast as to be of constitutional proportions.

Indeed, it was the circumstance that a constitutional amendment did not involve action by the legislature which saved the expenditure in *Luther Ely Smith*, 3 T. C. 696, from what would otherwise have been the condemnation of the regulation here in question. And that decision, *non constat* the Government's assertion

(U. S. Br. 25, note 7; 44, note 19) has never been overruled.

McClintock-Trunkey Co., 19 T. C. 297, reversed on other grounds, 217 F. 2d 329 (C. A. 9), one of the cases on which the Government now relies (U. S. Br. 25, note 7; 44, note 19), can scarcely qualify as an overruling decision. In its opinion there (19 T. C. at 304), the Tax Court not only did not cite *Luther Ely Smith*, it did not even discuss any distinction between an initiative measure and a constitutional amendment, and certainly the Commissioner of Internal Revenue did not at that juncture withdraw his previous acquiescence (1944 Cum. Bull. 26) in *Luther Ely Smith*.

Nor does the memorandum opinion in *Mosby Hotel Co.*, decided October 22, 1954 (U. S. Br. 25, note 7; 44, note 19) amount to an overruling, as the Government hopefully asserts (*ibid.*). For one thing, the Tax Court's memorandum opinions are not regarded as precedents and hence are not officially reported.⁵ More-

⁵ See the authoritative article by Judge Murdock of the Tax Court, *What Has the Tax Court of the United States Been Doing?* 31 A.B.A.J. 297, 298-299:

" * * * Memorandum Opinions are not published in printed form or included in the bound volumes of the reports of the court. The Presiding Judge also decides whether an opinion is or is not to be printed. The Memorandum Opinions, that is, the ones that are not printed, are supposed to be limited to those having no value as a precedent. They include any case decided solely upon the authority of another, cases covering subjects already well-covered by opinions appearing in the bound volumes of the reports, failure of proof cases, and some others. Doubts as to whether a case should be in memorandum form or printed are resolved in favor of printing. If counsel finds in a Memorandum Opinion some precedent of value, he may cite it effectively in his brief, even though it does not appear in the bound volumes of the reports of the court."

over, the Commissioner did not consider the *Mosby Hotel* case a precedent when it appeared for, here again, his published acquiescence in *Luther Ely Smith* was not withdrawn for three and half years after that memorandum appeared unofficially. That withdrawal, as we have hitherto pointed out (Pet. Br. 47-49), was triggered only by the grant of certiorari in the present case.

We have already pointed out why, the legislature not participating, there is no sound distinction in the present connection between in initiative measure and a constitutional amendment. Pet. Br. 47-49. The Government asserts the contrary (U. S. Br. 25, note 7)—but by assertion only. Just how the Government squares that position with the Commissioner's newly-fashioned declaration (Pet. Br. 48) that there is no real difference between the two is not for us to say.

We submit that, on the basis of the contemporaneous materials on the initiative, any attempt to equate an initiative measure with a bill pending in a legislature ignores history, ignores the obvious facts of political structure, and does violence to the general understanding of what is meant by "legislation."

B. The Government's effort to apply the regulation to activities that are directed against initiative measures that would destroy a taxpayer's business raises a serious constitutional question.

Petitioners urged, citing *Speiser v. Randall*, 357 U. S. 513, 518, that to construe the Treasury regulation here involved so as to deny them a business deduction would raise a serious constitutional question under the First Amendment (Pet. Br. 42-44). That contention was not, as the Government seems to think

(U. S. Br. 38, note 13), as effort to raise a new issue on appeal; rather, it is an attempt to avoid raising such an issue, which, under the *Speiser* case—decided after certiorari was granted herein—would assuredly be involved if the Government's position were supported.⁶

Here again, the Government's arguments are not addressed to the facts of the present case. It is not necessary to disagree with the Government's general proposition (U. S. Br. 37-42) that "The First Amendment is not violated by the Congressional policy against 'public subvention' of political pressure activities to influence legislation." For what is involved here, as we have repeatedly said in the face of the Government's studied refusal to recognize the fact, is an initiative measure that would have destroyed petitioner's business.

Consequently petitioners were not seeking to defeat just any initiative measure, they were acting to defeat an initiative measure that would have put them out of business, they were endeavoring to protect their existing business from destruction. It follows that their appeals to the public at large to defeat this initiative measure must be compared with their appeals to the public at large in the course of any other effort to protect and preserve the same business.

Petitioners' appeal to the public to use their products—ordinary trade advertising—would, plainly enough, be an effort to continue in business, and would in consequence qualify as "ordinary and neces-

⁶ The circumstance that (U. S. Br. 38) it does not "appear that the issue was raised in any other case in the 40-year history of the regulation" prior to the decision in *Speiser v. Randall*, 357 U.S. 513, is of course irrelevant.

sary" business expenditures, regardless of how the psychologists or the public relations experts or the students of mass communications might analyze that effort, or what labels or slogans they would apply thereto. Here petitioners appealed to the public to reject an initiative measure under the terms of which their business would have been destroyed. On what basis, therefore, can it be contended that the cost of the first method of attempting to continue in business may be deducted, but that the cost of the second may not?

We submit that *Speiser v. Randall*, 357 U. S. 513, 518, bars any such contention: "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. * * * To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."

Here petitioners are sought to be penalized for addressing communications to the people, not in terms asking the public to continue to buy petitioners' products, but asking the public to vote down a measure which would forbid petitioners to sell those products.

Both sets of communications have the same business objective. Indeed, it is entirely accurate to say that any attempt to distinguish the two forms of speech rests on one of two premises, both of which are equally untenable.

One is that there is something reprehensible about legislative activities even when they do not involve actual lobbying; that premise, as we have already pointed out at length (Pet. Br. 26-38; *supra*, pp. 14-16), lacks reasonable basis, runs counter to the statute, and has only the foundation of arbitrary fiat.

The other possible premise is that to permit petitioners to deduct the sums expended by them in the effort to defeat an initiative measure which plainly would have destroyed their business would involve "‘public subvention’ of political pressure activities to influence legislation" (U. S. Br. 27). The short answer is that allowing the deduction here no more amounts to subsidizing efforts to influence legislation generally than allowing the deduction in *Commissioner v. Heininger*, 320 U. S. 467, amounted to subsidizing mail frauds.

In each instance, the controlling fact was that the taxpayer stood to lose his business. We submit that nothing in the Internal Revenue Code operates to impair a taxpayer's right of self-defense. Compare *Bingham's Trust v. Commissioner*, 325 U. S. 365, discussed at Pet. Br. 37-38.

IV. The Reenactment Doctrine Does Not Serve to Sustain the Regulation in Its Application to the Facts of the Present Case.

Petitioners have already (Pet. Br. 51-59) fully discussed the infirmities of the reenactment doctrine as sought to be invoked here by the Government, and need add only a few words.

First. When that doctrine is tested by the necessary qualification that the same situation must be involved (*United States v. Missouri P. R. Co.*, 278 U. S. 269, 279-280), then, plainly, there has been no reenactment; since, in the sole instance prior to the enactment of the Internal Revenue Code of 1939 where a taxpayer spent money to avoid legislation that would have put him out

of business, he was allowed a deduction for those expenditures. *Lucas v. Wofford*, 49 F. 2d 1027 (C.A. 5).¹

Second. The Government traces the present regulation in a long footnote (U. S. Br. 29-31, note 10), and says (U. S. Br. 20, note 5) that "reissuance of an identical regulation can hardly destroy the effect of its long history." But where the Government relies, as it does here (U. S. Br. 25-27), on reenactment, it must show a course of dealing and a succession of regulations that are apparent and ascertainable. It is not sufficient to point to a regulation that has gone underground, to reappear in an unlikely location. For the basis of the reenactment doctrine, like that of the rule which attaches great weight to administrative construction, is notoriety; Congress is assumed to have had knowledge of a practice long continued and widely known. See *United States v. Midwest Oil Co.*, 236 U. S. 459, 472-473. In reenacting a statute, Congress may well be considered to have had in mind readily available textual history, but it can hardly be charged with having approved whatever may have been revealed by textual archeology. And the fact of the matter is that in the more than forty years since the first appearance of the regulation stating that expenditures for the promotion or defeat of legislation were not deductible, the Commissioner related that prohibition to business ex-

¹ In that case, the taxpayer sold a motor fuel the sale of which would have been prohibited by the terms of a bill introduced in the state legislature. He retained an attorney who presented an exempting amendment, and the latter appeared before the governor, the attorney general, and various committees of the legislature to urge its adoption. No lobbying was involved. The amendment was adopted. The court held that the attorney's fees were an ordinary and necessary business expense, and affirmed a decision of the Board of Tax Appeals in the taxpayer's favor.

penses only in a single year; during all the rest of the time he included it under donations, contributions, and gifts.⁵

⁵ To avoid any misleading impression that might be created by footnote 10 of the Government's brief (U. S. Br. 29-31), the following should be kept in mind:

When first issued, the regulation pertaining to corporations was captioned "Lobbying Expenses" (T.D. 2137, 17 Treas. Dec. 48, 57-58 (1915); Art. 143, Regs. 33 (1918 ed.)). On only one occasion, namely, in the aforementioned Article 143 of Regs. 33, did the corporate regulation ever state that expenditures for the promotion or defeat of legislation were not deductible as "ordinary and necessary" business expenses of a corporation—and that provision (Art. 143 of Regs. 33) was in effect for a single year: 1918.

Commencing with Art. 562, Regs. 45 (1919 ed.), and throughout all successive corporate regulations, the regulation in question omitted any reference to deductibility as an "ordinary and necessary" business expense in denying the deduction of expenditures for the promotion or defeat of legislation. See Art. 562 of Regs. 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924 and 1926, respectively; Art. 262 of Regs. 74 and 77, promulgated under the Revenue Acts of 1928 and 1932 respectively; Art. 23(o)-2 of Regs. 86 promulgated under the Revenue Act of 1934; Art. 23(q)-1 of Regs. 94, promulgated under the Revenue Act of 1936; Arts. 23(o)-1 and 23(q)-1 of Regs. 101, promulgated under the Revenue Act of 1938; and Sections 19.23(o)-1 and 19.23(q)-1 of Regs. 103; 29.23(o)-1 and 29.23(q)-1 of Regs. 111; and 39.23(o)-1 and 39.23(q)-1 of Regs. 118, all promulgated under the Internal Revenue Code of 1939.

Of equal significance with such express omission are the facts that (a), commencing with said Art. 562 of Regs. 45 (1919 ed.), the corporate regulation was successively captioned "Donations", "Donations by corporations" and "Contributions or gifts by corporations"; and (b), commencing with the initial indexing of the corporate regulation under a Code section in Art. 262 of Regs. 74, promulgated under Revenue Act of 1928, this regulation was indexed under sections of the Code entitled "Charitable and Other

Consequently, unless the doctrine of reenactment is now to become not only a fiction but a particularly abhorrent fiction, it is plain that the Congress in reenacting Section 23(a) did not enact as a part thereof a regulation that the Commissioner for over more than thirty years had keyed to Section 23(o).

Third. In *Luther Ely Smith*, 3 T. C. 696, the Tax Court held the regulation inapplicable to a measure that was legislative in character but did not require action by a legislature. The Commissioner acquiesced in that decision for some fourteen years. Under *Helvering v. Winmill*, 305 U. S. 79, 83, a reenactment case specifically rested on "regulations and interpretations long continued without substantial change", which is here relied on by both sides (Pet. Br. 58, U. S. Br. 25), it is plain that, if the reenactment doctrine has any weight in the present situation, it is decisive for petitioners.

Very plainly, the United States may not simultaneously blow hot and cold. It may not urge reenactment on the basis of a long course of consistent dealing and at the same time rely on the Commissioner's withdrawal of his fourteen-year-long *Luther Ely Smith* acquiescence, just after certiorari had been granted in the present case. Reenactment cannot be predicated upon such a *post motam litem* flip-flop.

Contributions" and was not indexed under the business expense Code sections.

No provision dealing with the deduction of expenditures for the promotion or defeat of legislation was inserted in the regulations dealing with individuals until 1938; see Pet. Br. 56. Here again no reference was made to deductibility as an "ordinary and necessary" business expense, the regulation was captioned "Contributions or gifts by individuals", and it was likewise indexed under a section of the Code entitled "Charitable and Other Contributions".

V. The Government's Newly Fashioned Attack on Petitioners' Activities as "Propaganda" Is at Variance With the District Court's Specific Findings That Such Activities Were Proper, Lacks Support in the Record, and Constitutes an Unwarranted Assault Upon Freedom of Speech.

The Government now argues that petitioners' efforts to defeat Initiative No. 13—which would have destroyed their business—constituted “the exploitation of propaganda” within the terms of the regulation (U. S. Br. 47-48), and that moreover petitioners' activities could not qualify as “open, honest non-lobbying efforts” (U. S. Br. 51-53). The Government asserts that what petitioners did constituted “propaganda”, essentially (U. S. Br. 47-48) because it was “a concerted attempt to influence public opinion by colored facts from concealed sources.”

These contentions were not made below. The advertisements on which the Government now relies (R. 151-158, cited at U. S. Br. 47, 52) were not a part of the printed record when the case was before the Ninth Circuit, and were not before this Court even in unprinted form while the case was pending on petition for certiorari. The Clerk's files show that this material was neither filed here nor designated for inclusion until after certiorari was granted. The present arguments are accordingly afterthoughts—and, as will be seen, they have the usual infirmities of such productions.

A. The Government's present characterization of petitioners' efforts as improper are contradicted by the district court's specific findings.

The Government's newly-fashioned characterization of petitioners' activities run afoul of the district court's opinion and findings, both of which emphasized the propriety of what petitioners did.

In his oral opinion, the district judge said (R. 29):

“ * * * This is not to indicate that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for having spent the money to defeat the legislation by fair publicity. They had a right to do that and propriety of expenditures therefore is not in question. * * * ”

Later he specifically found (Fdg. 11, R. 47):

“ * * * There was nothing wrong or evil or corrupt about spending money for this purpose. Expenditures to enlighten and inform the public with respect to initiative measures are perfectly proper and laudable.”

In the face of these findings, the Government's belatedly conceived attack on the propriety of petitioners' action (U. S. Br. 47-48, 51-53) necessarily fails.

B. The record does not support the Government's assertion that petitioners' efforts were untrue or secret.

It is argued (U. S. Br. 52-53) that the presentation of the arguments against Initiative No. 13 was neither open nor honest, because, so it is said, “nowhere does it appear that the campaign was sponsored by beer and wine wholesalers or retailers or any others who had

a financial interest in the legislative result" (U. S. Br. 52).

The facts are quite to the contrary. The record specifically shows (a) that the published arguments against Initiative No. 13 made it perfectly plain that the beer industry and its employees had a deep concern over and a direct interest in the measure; (b) that the beer wholesalers did not single-handedly sponsor the campaign against the measure; and (c) that neither the question of sponsorship nor the question of what groups also contributed was litigated at the trial.

1. Under the Washington statutes cited by the Government (U. S. Br. 46, note 20), arguments for and against Initiative No. 13 were circulated at public expense. Those arguments are in the record (R. 96-101). The Argument against Initiative No. 13 said in part (R. 101):

"These are the most serious effects of Initiative 13—but there are also others. The beer and wine industry provides jobs directly for 14,000 persons in the state—jobs with an annual payroll of \$35,000,000. It pays taxes of nearly 22 million dollars a year. It is a Washington business buying more than \$52,000,000 a year in Washington products."

Plainly, therefore, every voter in the State was specifically advised of the obvious fact that Initiative No. 13 would have affected adversely not only the beer and wine industry but its employees—all of whom in consequence had "a financial interest in the legislative result" (U. S. Br. 52). We cannot forbear to express surprise at the invidious terms in which the Government thus characterizes the situation of the many in-

dividuals who would have joined the ranks of the unemployed had the people adopted Initiative No. 13.

2. The record refutes the Government's present contention that the beer wholesalers alone sponsored the campaign against Initiative No. 13, and that any advertising not so stating was in consequence untrue.

Adwen, Secretary of the Beer Wholesalers, testified (R. 77):

"A. In 1948, Mr. Kehoe, we became aware that this would put our people out of business. I say 'our' again bearing in mind at least 90 per cent, and that it was necessary for the organization along with other organizations affected to protect themselves by raising certain amounts of money to see that we were taken care of by probably some advertising concern. * * *"

At R. 85:

"A. This, sir, was the fund that was set up in which the wineries, beer wholesalers and tavern operators set up called the Industry Advisory fund. That was the fund to which Washington Beer Wholesalers contributed at various times whenever it was necessary to keep, get a little more money in the bank."

Also contributing to the fund was the Washington Brewers Institute (R. 111-116), an organization vitally concerned (R. 112), although not threatened with being put out of business, since its members' product would be bought by state retail stores.

The extent to which the Beer Wholesalers and the Brewers contributed to the campaign by comparison with other organizations who likewise opposed Initiative No. 13 does not appear, this matter not having

been litigated at the trial nor considered in any of the pretrial proceedings (R. 20-26).

3. Nor is there any evidence in the record tending to show that the organizations sponsoring the advertising to which petitioners contributed were misnamed. The exact composition of "Men and Women Against Prohibition" (R. 152, 153, 155, 157, 159, 161-164) and "Citizens Liquor Control Council, Inc." (R. 168, 182), is not shown, but if, as seems likely, it included, besides the business men who would have lost their jobs through the operation of Initiative No. 13, those large groups of citizens who, (a) liked to frequent taverns, (b) resented anything that even smacked of further liquor restrictions, and/or (c) believed in free enterprise and therefore wanted to keep the State of Washington out of any additional retail businesses, then the titles used were an accurate collective characterization of the two organizations. No doubt, if the Government at or before the trial had considered the make-up of either group material to any issue in the case, the matter could easily have been explored then.

C. The Government's labeling of petitioners' activities as "propaganda" adds nothing except an epithet.

The Treasury regulation in question speaks of "the exploitation of propaganda" (Pet. Br. 68), while the statute to which that regulation relates (Sec. 23(o), I.R.C. 1939; U. S. Br. 55) mentions "carrying on propaganda". In this Court the Government invokes the regulatory phrase (U. S. Br. 47-48).

It would appear that the Government characterizes the advertisements to which petitioners contributed as "propaganda" because, in the Government's view, the arguments made were extreme, non-objective, and "dis-

closed a selfish or ulterior motive" (U. S. Br. 48). Apparently in the Government's view, it is selfish and ulterior for petitioners to attempt to protect a lawful business from destruction; it is similarly selfish and ulterior for the employees concerned to wish to protect their jobs; and it is not objective to portray the initiative as leading to the return of the speakeasy, bootleggers, gangsters, and racketeers (U. S. Br. 47).

The Government does not attack the motives of the proponents of Initiative No. 13. These individuals, who stood to lose neither their business nor their livelihood, were presumably—in the Government's view—unselfish, and acted from the highest of motives. The Government's objectivity in the matter is perhaps best demonstrated by the circumstance that it does not adversely characterize the published arguments of the measure's proponents, arguments that included the following (R. 96, 98):

"Unquestionably Taverns Are a Menace. They are the breeding places for immorality, crime and youth delinquency. Read the stories (of tavern-centered tragedy) in your own newspapers. Quarrels—fights—broken homes—unattended children—drunken men, women, juveniles—drunken driving. The taverns of today are far worse than the old time saloons ever were."

* * * *

"A Day of Decision Is at Hand. The Taverns Have Sinned Away Their Day of Grace. No Longer Will the Voters of the State of Washington Tolerate These Establishments Which Disgrace Men, Women and Children, and Undermine and Sabotage the Welfare of the People of This State."

On their face, the arguments in favor of the measure would appear to warrant some of the characterizations the Government applies to the arguments in opposition (U. S. Br. 47-48)—although we do not understand that the right to make a contention has hitherto depended in any degree on the merits of that contention.

The short of the matter is that any argument can always be characterized as "propaganda" by those on the other side, so that, in actual fact, the word "propaganda" has become an epithet. It adds nothing to the discussion, and as sought to be applied to what would otherwise be business expenses is either void for vagueness or else runs afoul of the First Amendment.

For at what stage does business advertising become "propaganda"? Consider the advertising slogans that have passed into the language: "Ask the man who owns one"; "I'd walk a mile for a Camel"; "His master's voice"; "You just know she wears them"; "LS/MFT"; and a host of other examples which will readily occur to the reader. Who will separate those familiar catchwords into advertising and propaganda? And if they are so separated, so that expenses for one are deductible while those for the other are not, then, plainly, the resultant differentiation runs afoul of *Speiser v. Randall*, 357 U. S. 513, 518.

The regulation as it now stands (Pet. Br. 68) denies deductions for "Sums of money expended for * * * the exploitation of propaganda, including advertising other than trade advertising * * *"

There can be no quarrel with the denial of a deduction for "advertising other than trade advertising," since that category has no business purpose and thus sums expended therefor are neither ordinary nor neces-

sary within the statute. Here, however, the advertising had a business purpose under the rule of *Commissioner v. Heininger*, 320 U. S. 467, because its objective was to prevent destruction of the business. That being so, the deduction cannot be disallowed by any attempt to stigmatize that advertising as "propaganda."

The only valid test, we submit, is the relationship of the communication to the income-producing enterprise. If it qualifies in other respects as a business expense, then it does not lose its deductible status because someone else may seek to characterize it, on one basis or another, as "propaganda." Here again, the Government's difficulties are of its own making; its consistent refusal (*supra*, pp. 2-10) to consider the business effect of the initiative measure that petitioners opposed necessarily leads it, here also, to talk of "propaganda" and to ignore that what this case involved was business propaganda with a business purpose and hence just as legitimate—and equally as deductible—as any trade advertising.

For the rest, it is sufficient to note that perhaps the only realistic definition of "propaganda" is its cynical characterization as "the other fellow's arguments."

D. Finally, the Government's present position constitutes an unwarranted attack on freedom of speech.

What is so disturbing about the Government's approach in this case is that to avoid paying out a few tax dollars—\$153.98 in this case (R. 10, 15, 21)—it makes a serious, unwarranted, and unjustified attack on petitioners' right to appeal to their fellow-citizens not to be put out of business, and hence on freedom of speech itself.

The Government begins by invoking previous investigations of lobbying (U. S. Br. 32-35), and from there it moves to attack "political pressure activities to influence legislation" (U. S. Br. 37-42). Then, after arguing that there is no difference between opposing legislation pending before a legislature and an initiative measure pending before the people at large (U. S. Br. 42-46), the Government characterizes as "propaganda" the campaign to which petitioners contributed (U. S. Br. 47-48), and finally urges—without record support and indeed in the very teeth of the record; *supra*, pp. 32-35—that the campaign was neither open nor honest (U. S. Br. 51-53).

The totality of the argument, aimed at taxpayers who addressed appeals to their fellow citizens to reject an initiative measure that would have destroyed their business, constitutes as dangerous an assault as has been made in some time upon freedom of speech and upon the very essence of the democratic process.

This Court has twice in recent years distinguished between lobbying—the personal solicitation of individual legislators—and the attempt, here involved, "to saturate the thinking of the community." *United States v. Rumely*, 345 U.S. 41; *United States v. Harris*, 347 U. S. 612. Even so, this Court was divided, in these cases as well as in *United States v. Automobile Workers*, 352 U. S. 567, as to the precise limitation placed by the First Amendment on the Congressional power to protect federal elections and its own legislative processes. But here, where the Government verbalizes the people of the entire State into "the legislators themselves" (U. S. Br. 50-51), there can be no doubt that a regulation which, by discriminatory denial of a tax deduction allows businessmen to com-

municate to the public on every subject pertaining to their business except in respect of an initiative measure which would destroy that business, plainly contravenes the First Amendment. *Speiser v. Randall*, 357 U. S. 513. Therefore, just as in the *Rumely* and *Harriss* cases, this Court should construe the Treasury regulation here involved so as to avoid a constitutional question.

CONCLUSION

For the foregoing additional reasons, the judgment below should be reversed, with directions to enter judgment for the petitioners in the amount prayed for.

Respectfully submitted,

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John F. Kennedy

WILLIAM B. CANNON, JR. and JAMES CANNON, JR.

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRICK FOR THE UNITED STATES OF AMERICA

WILLIAM B. CANNON, JR.
JAMES CANNON, JR.
Attorneys for the Petitioners

VERMONT, U.S.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 718

**WILLIAM B. CAMMARANO AND LOUISE CAMMARANO, HIS
WIFE, PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 27-30) is not reported. The opinion of the Court of Appeals (R. 136-140; Pet. App. A1-A6) is reported at 246 F. 2d 751.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1957. (R. 141.) A petition for rehearing was filed on August 27, 1957, and was denied on October 15, 1957. (R. 142.) The petition for a writ of certiorari was filed on January 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that

amounts expended by taxpayers in an effort to defeat proposed initiative legislation in the State of Washington were not deductible as "ordinary and necessary" business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(o)-1. *Contributions or Gifts by Individuals.*—* * *

* * * * *

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other

than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

* * * * *

STATEMENT

This is an action instituted to recover income taxes paid by taxpayers for the year, 1948. Deductions claimed by taxpayers in the amount of \$886.29 were disallowed by the Commissioner for that year, resulting in an increase in tax in the sum of \$153.98. This amount was paid and this action was instituted for its recovery. (R. 20-22). The relevant facts found by the District Court (R. 44-47) may be summarized as follows:

Taxpayers were husband and wife and filed a joint income tax return for the year 1948. They owned a one-fourth interest in a partnership carrying on the wholesale distribution of beer under the trade name "Cammarano Brothers" in Tacoma, Washington. (R. 44-45.)

In 1948, the partnership paid \$3,545.15 to the Washington Beer Wholesalers Association, Inc., Trust Fund, of which taxpayers' proportionate share was \$886.29. The trust fund was established on December 17, 1947, by the Association, of which the partnership was a member, to help finance an extensive statewide publicity program on the part of wholesale and retail beer and wine dealers. (R. 45.) The publicity program urged the defeat of "Initiative to the Legislature No. 13", which was submitted to the people of the State of Washington at the general election held on November 2, 1948, in accordance with the legislation provisions of

the State Constitution. The Initiative would have placed the retail sale of wine and beer exclusively in state owned and operated stores. (R. 45.) The ballot title of the Initiative was as follows (R. 45): "An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

The proposal had previously been submitted to the state legislature, and an officer of the Beer Wholesalers Association kept close track of its progress, contacted many of the legislators, and urged its defeat. The legislature did not act on the proposal. (R. 45-46.)

When the proposal was submitted to the people as an initiative measure, the wholesale and retail beer and wine dealers determined to undertake a vast publicity program aimed at the voters. This program was directed by a committee composed of members of the various groups and associations interested in defeating the proposal and was financed by contributions from such groups and associations and other interested parties. The committee established to direct the program was known as the Industry Advisory Committee, which received contributions totalling \$231,257.10. Of this total, the sum of \$53,500 was contributed by the Beer Wholesalers Association, which collected it by assessing its members in accordance with their volume of business. The collections were handled through a trust fund established as a separate entity to receive and disburse the assessments. The publicity program was carried out by various types of advertising, none of which made reference to the wares or members of the Association as such. The proposal was defeated. (R: 46.)

The District Court found that the payment made by Cammarano Brothers to the trust fund was for propaganda and to defeat legislation, and therefore concluded that it was not an ordinary and necessary expense deductible under Section 23(a)(1)(A) of the Internal Revenue Code. (R. 47-48.) The Court of Appeals affirmed upon the same ground. The Court of Appeals also held, on the basis of a finding by the District Court, that taxpayers had failed to sustain their burden of proving that passage of the initiative, aimed as it was at retail sales of wine and beer, would have impaired their wholesale beer business. (R. 136-140; Pet. A1-A6.)

ARGUMENT

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (*supra*, p. 2) permits the deduction of all "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *." Section 29.23(o)-1 of Treasury Regulations 111 (*supra*, pp. 2-3) precludes the deduction of sums "expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, * * *."

In their petition, taxpayers appear to argue both that the regulation is invalid and, if valid, that it is inapplicable. The validity of an identical regulation has been sustained by this Court in *Textile Mills Corp. v. Commissioner*, 314 U. S. 326. And the applicability of the regulation to the type of expenditures involved here is made clear, not only by the *Textile Mills* decision, but also by the decisions of all the Courts of Appeals which have had occasion to pass upon the question. *Revere Racing Assn. v. Scanlon*, 232 F. 2d 816 (C.

A. 1st); *American Hardware & Eq. Co. v. Commissioner*, 202 F. 2d 126 (C. A. 4th), certiorari denied, 346 U. S. 814; *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (C. A. 8th), certiorari denied, 344 U. S. 865; *F. Strauss & Son v. Commissioner*, not yet reported (C. A. 8th), decided January 24, 1958 (reproduced as an appendix, *infra*, p. 12); *Sunset Scavenger Co. v. Commissioner*, 84 F. 2d 453 (C. A. 9th); *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676 (C. A. 9th), affirmed on other issues, 293 U. S. 289.¹

Taxpayers, therefore, present no question warranting review by this Court.

(a.) The validity of a regulation identical to the one here questioned was directly challenged before this Court in *Textile Mills Corp. v. Commissioner*, *supra*. In that case, the taxpayer had employed a publicist to prepare speeches, news items, and editorials, and two attorneys to prepare propaganda material on international relations, treaty rights, and alien property policy, all for the purpose of obtaining the enactment of legislation providing for the return of German property seized by this Government during World War I. There, as here, the taxpayer asserted that the regulation unduly narrowed the scope of the deduction provided by the statute. This contention was rejected by this Court, which held (pp. 338-339) that the statutory phrase "ordinary and necessary" was not so unambiguous as to leave no room for an interpretative regulation and that the regulation in question constituted an ap-

¹ See also *Davis v. Commissioner*, 26 T.C. 49; *McClintock-Trunk Co. v. Commissioner*, 19 T. C. 297, reversed on other grounds, 217 F. 2d 329 (C.A. 9th); *Wm. T. Stover Co. v. Commissioner*, 27 T. C. 434; *Mosby Hotel Co. v. Commissioner*, decided October 22, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,288).

propriate exercise of authority by the rule-making body. This holding, as already noted (*supra*, pp. 5-6), has been uniformly followed by the Courts of Appeals.

Moreover, in view of the repeated congressional reenactment of the statutory provision under which the regulation was promulgated, the regulation has acquired the force of law.² *Helvering v. Winmill*, 305 U. S. 79, 83; *Commissioner v. Flowers*, 326 U. S. 465, 469; *Boehm v. Commissioner*, 326 U. S. 287, 291-292. This principle has repeatedly been applied to the particular regulation involved here. *Textile Mills Corp. v. Commissioner*, *supra*, pp. 338-339; *Sunset Scavenger Co. v. Commissioner*, *supra*, p. 456; *Roberts Dairy Co. v. Commissioner*, *supra*, p. 950; *American Hardware & Eq. Co. v. Commissioner*, *supra*, pp. 129-130. See also *Commissioner v. Heininger*, 320 U. S. 467, 470; *Lilly v. Commissioner*, 343 U. S. 90, 95.

(b.) Arguing in the alternative that the regulation is inapplicable, taxpayers (Pet. 9) seek to limit this Court's decision in *Textile Mills Corp. v. Commissioner*, *supra*, to "lobbying, i. e., the exertion of pres-

² The regulation first appeared in its present form in Article 562 of Treasury Regulations 45 (1919 ed.), promulgated under the Revenue Act of 1918, and has appeared thereafter without change in all successive regulations. See Article 562 of Treasury Regulations 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924, and 1926, Article 262 of Treasury Regulations 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, Article 23(o)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 23(q)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 23(o)-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, Sections 19.23(o)-1, 29.23(o)-1, and 39.23(o)-1 of Treasury Regulations 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939, and Section 1.162-15 of the proposed Income Tax Regulations under the Internal Revenue Code of 1954.

asures and persuasion on individual legislators * * *." According to taxpayers, this case concerns (Pet. 9) "the wholly different effort 'to saturate the thinking of the community' (*United States v. Rumely*, 345 U. S. 41, 47), which is an activity directed at the entire body politic."

But the short answer is that the latter type of activity—designed "to saturate the thinking of the community"—is precisely the type of activity which was involved in *Textile Mills*. The deductions claimed in that case related to the preparation and dissemination of news items, speeches, editorials, and similar material—in other words, not direct dealings with legislators (or "buttonholing"), but rather propaganda "directed at the entire body politic." The expenditures at issue in *Textile Mills* all represented compensation to three individuals—a publicist and two lawyers. None of the three, it appears, ever engaged in what the taxpayers call "lobbying, i.e., the exertion of pressures and persuasion on individual legislators * * *." See 314 U. S. 326, 336; 38 B. T. A. 623, 625.

Taxpayers' reliance on *Rumely*, moreover, is misplaced. That case (p. 44) involved an interpretation of the first clause of a congressional resolution authorizing an investigation of

"(1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation."

It was there held that publicity efforts "to saturate the thinking of the community" were not encompassed within the first clause. But the Court also made it

abundantly clear that there was no such omission with respect to the broader second clause (*supra*), which was not qualified by the term "lobbying" but instead extended generally to "activities * * * intending to influence, encourage, promote or retard legislation."³ This second clause is paralleled in every respect by the regulation involved in the instant case. Like that clause, the regulation expressly includes within its terms expenditures for "the promotion or defeat of legislation" (and "the exploitation of propaganda") as well as "lobbying", and thus contains the very language which this Court found lacking in *Rumely*.

The activities to which taxpayers contributed in the present case were plainly designed to defeat legislation within the meaning of the regulation. The power of the people of the State of Washington to approve or defeat proposals by initiative or referendum is the exercise of a legislative power reserved to them by the State Constitution. *Senior Cit. L. v. Dept. Soc. Sec.*, 38 Wash. 2d 142. Deductions for similar expenditures have repeatedly been disallowed where, as here, activities were directed to influencing the electorate to adopt or defeat legislative proposals of this nature. *Revere Racing Assn. v. Scanlon, supra*; *F. Strauss & Son, Inc. v. Commissioner, supra*; *Sunset Scavenger Co. v. Commissioner, supra*; *Old Mission P. Cement Co. v. Com-*

³ The Court stated (p. 47):

If "lobbying" was to cover all activities of anyone intending to influence, encourage, promote or retard legislation, why did Congress differentiate between "lobbying activities" and other "activities * * * intended to influence"? Had Congress wished to authorize so extensive an investigation of the influences that form public opinion, would it not have used language at least as explicit as it employed in the very resolution in question in authorizing investigation of government agencies?

*missioner, supra.*⁴ The decision below is thus strictly in accord with an unbroken line of appellate decisions construing the scope of the regulation. And, even as an original matter, it can hardly be regarded as unreasonable to deny the deduction to *both* expenditures to propagandize the general public with respect to legislative action by their representatives (as in *Textile Mills*) and expenditures to propagandize the general public with respect to legislative action by the people themselves (as here).

2. The decision below also rests upon the additional independent ground that taxpayers, as the trial court found (R. 46), failed to prove in what particular manner their business would be injured by passage of the initiative measure and thus failed to establish that the expenditures were ordinary and necessary within the meaning of the statute. In attacking this holding (Pet. 14-15), taxpayers rely upon testimony by an officer of the Beer Wholesalers Association to the effect that 90 per cent of the beer wholesalers would be out of business if the initiative was adopted. This general statement, however, falls far short of demonstrating that the taxpayers themselves would have suffered, particularly in view of the same witness' admission (R. 76-77) that some of the wholesale distributors

⁴ The decision of the Tax Court in *Smith v. Commissioner*, 3 T. C. 696, relied upon by taxpayers (Pet. 10-11), involved the adoption of a self-operative amendment to the Missouri Constitution and hence (p. 702) "no legislation was needed or involved." The subsequent decisions of the Tax Court (cited *supra*, note 1), including its decision in *McClintock-Trunkey v. Commissioner* involving the same initiative measure as here, indicate that this distinction has, for all practical purposes, been rejected. For the views of the Court of Appeals for the Eighth Circuit, which includes the State of Missouri, see that court's recent opinion in *Strauss v. Commissioner*, *infra*, p. 12.

would still be required to have representatives call upon the State Liquor Board to sell their merchandise. Nor can judicial notice (Pet. 14) serve as a substitute for such a showing. The initiative proposal, it should be noted, was not a prohibition measure, but only a measure designed to have beer and wine sold through state-owned stores.

CONCLUSION.

The principal issues involved in this petition have previously been determined by this Court, and there is no conflict among the Courts of Appeals. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

FEBRUARY 1958.

APPENDIX

**UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

No. 15,864.

F. STRAUSS & SON, INC. OF ARKANSAS, PETITIONER**VS.****COMMISSIONER OF INTERNAL REVENUE, RESPONDENT****Petition to Review Decision of The Tax Court of the
United States.****(January 24, 1958)****Before GARDNER, Chief Judge, and WOODROUGH and
VOGEL, Circuit Judges.****GARDNER, Chief Judge.**

This matter is before us on petition to review a decision of the Tax Court which determined a deficiency in petitioner's income tax for the year 1950 in the amount of \$10,386.12.

Taxpayer is a corporation which at all times here pertinent was engaged in the wholesale liquor business in Little Rock, Arkansas. The sale of liquor in Arkansas has been legal since 1935, subject to state laws providing for county-wide option. At a general election held in November, 1950, there was submitted to vote, pursuant to the Arkansas law, an initiated measure in the nature of a state-wide prohibition act which by its terms would have made it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to or transport the same within the state.

In this situation taxpayer and eight other wholesale liquor dealers organized a corporation known in the

record as the Arkansas Legal Control Associates, Inc., which we shall hereinafter refer to as the corporation. The purpose of the wholesalers in forming the corporation was to persuade the electorate to vote against the proposed prohibition act, and for the period from May 30 to November 30, 1950, the corporation received contributions totaling \$126,265.84 and disbursed over \$100,009 for direct advertising through newspapers, radio, billboards, book matches, bar banners, special folders and press releases. Such advertising contained arguments designed to convince the voters that it was in the public interest to defeat the proposed prohibition act. Taxpayer's contribution to the corporation amounted to \$9,252.67. On its income tax return for 1950 taxpayer deducted this amount from gross income as an ordinary and necessary business expense but the Commissioner disallowed this deduction.

In the Tax Court taxpayer contended that its payment to the corporation was deductible as a business expense, or alternatively, as a contribution. The Tax Court determined that the payment made by taxpayer to the corporation was neither deductible as a contribution under Section 23(q) of the Internal Revenue Code of 1939 nor as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939. Taxpayer has now abandoned its contention that this payment to the corporation was a contribution deductible under Section 23(q) of the Internal Revenue Code of 1939, but adheres to its contention that its payment to the corporation was an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939, and that is the sole question presented for our determination.

Section 23(a)(1)(A) reads in part as follows:

"In computing net income there shall be allowed as deductions: * * * All the ordinary and necessary

expenses paid or incurred during the taxable year in carrying on any trade or business * * * .”

The statute does not define nor determine what is or is not an “ordinary and necessary” business expense. Deductions are a matter of legislative grace and do not turn on general equitable considerations and the burden of clearly showing the right to the claimed deduction is on the taxpayer. *Deputy v. DuPont*, 308 U.S. 488; *New Colonial Co. v. Helvering*, 292 U.S. 435; *Omaha Nat. Bank v. Commissioner of Internal Rev.*, 8 Cir., 183 F.2d 899; *O’Malley v. Yost*, 8 Cir., 186 F.2d 603; *Wetterau Grocer Co. v. Commissioner of Internal Rev.*, 8 Cir., 179 F.2d 158; *Montana Power Company v. United States*, 3 Cir., 232 F.2d 541. In *New Colonial Co. v. Helvering*, supra, the rule is stated as follows:

“Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.”

In *Omaha Nat. Bank v. Commissioner of Internal Rev.*, supra, in referring to the rule to be followed in determining income tax deductions we said:

“In examining the taxpayer’s argument we are required to be mindful of the rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer.”

The statute allowing deductions for ordinary and necessary business expenses, as has been observed, does not define nor determine what is or is not an ordinary and necessary business expense. In this situation Section 29.23(q)-1, Treasury Regulation 111, was adopted definitely describing certain classes of expenditures as

not allowable deductions under this statute. The regulation reads as follows:

“ * * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.”

This regulation has been in effect for nearly forty years and is in the nature of a proclaimed policy. It was considered and sustained by the Supreme Court in *Textile Mills Corp. v. Comm'r.*, 314 U.S. 326. In that case the court disallowed as deductions expenditures for services rendered in an attempt to procure legislation authorizing payment of claims submitted by former enemy aliens. In the course of the opinion the court among other things said:

“The words ‘ordinary and necessary’ are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch v. Helvering*, 290 U.S. 111; *Deputy v. duPont*, 308 U.S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist v. Child*, 21 Wall. 441; *Hazelton v. Sheckells*, 202 U.S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases

need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn."

See also *McDonald v. Commissioner*, 323 U.S. 57; *Roberts Dairy Co. v. Commissioner of Internal Rev.*, 8 Cir., 195 F.2d 948; *Sunset Scavenger Co. v. Commissioner of Internal Rev.*, 9 Cir., 84 F.2d 453; *Cammarano v. United States*, 9 Cir., 246 F.2d 751; *Revere Racing Association v. Scanlon*, 1 Cir., 232 F.2d 816; *American Hardware & Eq. Co. v. Commissioner of Internal Rev.*, 4 Cir., 202 F.2d 126.

Taxpayer is a corporation organized for the purpose of conducting a wholesale liquor business. It cannot, we think, be reasonably contended that expenditure in conducting a campaign for the defeat of a proposed prohibition enactment was an ordinary and necessary expense of "carrying on" a wholesale liquor business. The corporation was empowered by its charter to conduct a wholesale liquor business and it was not empowered by its charter or articles of incorporation to conduct political campaigns. In *McDonald v. Commissioner*, *supra*, petitioner made very substantial expenditures in his campaign to be re-elected a judge and he sought to deduct these expenditures as ordinary and necessary business expenses. In denying the right

to make these deductions, the court among other things said:

"He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years."

In that case, as in the instant case, it was urged that the expenditure was necessary as his defeat in the election would ruin his business. Quite aside from the Treasury Regulation, we think it cannot be said that this statute, Section 23(a)(1)(A) of the Internal Revenue Code of 1939, is a clear provision for such allowance.

It is urged by taxpayer that the quoted regulation, if applicable, is invalid, and in this connection it is contended that as there has been no real re-enactment of the Internal Revenue Code since this regulation was approved by the Supreme Court in the *Textile Mills* case, *supra*, the question of its validity is still an open one and, hence, it is not entitled to the support of the principle that repeated Congressional re-enactment of the statutory provision to which a regulation pertains gives it the force and effect of law. The decision in the *Textile Mills* case was presumably well known to the Congress. The Congress has had many sessions since this decision was handed down and the regulation itself has been in effect for nearly forty years, and presumably that fact was also well known to the Congress. Nevertheless, the Congress has passed no act rejecting the construction given this statute by this regulation. *United States v. Armature Rewinding Co.*, 8 Cir., 124 F.2d 589; 47 C.J.S. Internal Revenue, Section 70, p. 201. In *United States v. Armature Rewinding Co.*, *supra*, in referring to the fact that the Congress had passed no act rejecting the construction adopted by the Commissioner of Internal Revenue, we said:

"It has, however, become increasingly apparent that the purpose of a taxing act, the probable intent of Congress, the general statutory scheme of taxation set up, and the construction adopted by the Commissioner of Internal Revenue and not rejected by Congress must all be given appropriate effect in determining what meaning is to be accorded a word or a phrase in such an act."

The applicable rule is succinctly stated in 47 C. J. S. Internal Revenue, *supra*, as follows:

"A treasury department regulation construing and interpreting an internal revenue statute is deemed approved by congress where congress thereafter substantially reenacts the statute. *A similar inference of congressional approval of the regulation is made where a substantial period of time has elapsed since the promulgation of the regulation and congress has not acted with respect to the statute * * *.*" (Italics supplied.)

Manifestly, under this regulation the deductions here claimed did not constitute ordinary and necessary business expenses.

Taxpayer contends that the doctrine of the *Textile Mills* case has been modified by the decisions of the Supreme Court in *Commissioner v. Heininger*, 320 U.S. 467, and *Lilly v. Commissioner*, 343 U.S. 90. The argument is plausible but not convincing. The *Textile Mills* case sustained without qualification the regulatory provision in question as valid. In *Commissioner v. Heininger* and *Lilly v. Commissioner*, both *supra*, the decisions were not based upon the Treasury Regulations but the question was whether certain expenditures were non-deductible because contrary to public policy. The court held they were not contrary to public policy and, hence, deductible. We think these decisions de-

tracted nothing from the teaching of the decision in the *Textile Mills* case.

We have considered all the other contentions urged by taxpayer but think them without merit. The decision of the Tax Court is therefore affirmed.

A true copy.

Attest:

EUGENE C. FISHER,
Acting Clerk,

U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM B. CAMMARANO AND LOUISE CAMMARANO,
HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

F. STRAUSS & SON, INC., OF ARKANSAS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF HABEAS CORPUS TO THE COURTS OF APPEALS FOR
THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 29

WILLIAM B. CAMMARANO AND LOUISE CAMMARANO,
HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 50

F. STRAUSS & SON, INC., OF ARKANSAS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE COURTS OF APPEALS FOR
THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals in No. 29 (C. R. 134-139)¹ is reported at 246 F. 2d 751. The

¹ The designation "C. R." refers to the printed record in No. 29, *William B. Cammarano and Louise Cammarano, His Wife v. United States of America*, and the designation "S. R." refers to the printed record in No. 50, *F. Strauss & Son, Inc. of Arkansas v. Commissioner of Internal Revenue*.

opinion of the Court of Appeals in No. 50 (S. R. 38-44) is reported at 251 F. 2d 724.

The oral opinion of the District Court in No. 29 (C. R. 27-30) is not reported. The opinion of the Tax Court in No. 50 (S. R. 26-32) is reported at 28 T. C. 591.

JURISDICTION

The judgment of the Court of Appeals in No. 29 was entered on July 8, 1957 (C. R. 139). A petition for rehearing was filed on August 27, 1957, and was denied on October 15, 1958 (C. R. 140). The petition for a writ of certiorari was filed on January 10, 1958, and was granted on March 3, 1958 (C. R. 140). The judgment of the Court of Appeals in No. 50 was entered on January 24, 1958 (S. R. 44-45). A petition for rehearing was denied on March 3, 1958 (S. R. 45). The petition for a writ of certiorari was filed on April 16, 1958, and was granted on May 26, 1958 (S. R. 46). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether taxpayers' payments to organizations established to finance publicity campaigns aimed at defeating proposed initiative legislation in the States of Washington and Arkansas are deductible as "ordinary and necessary" business expenses under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

Sections 23 (a) (1) (A), 23 (o) and (q), and 101 (6) of the Internal Revenue Code of 1939, and Sections 29.23 (o)-1 and 29.23 (q)-1 of Treasury Regulations 111, are set forth in the Appendix, *infra*, pp. 55-57.

STATEMENT

These cases involve the question of deductibility, as "ordinary and necessary" business expenses, of sums paid by the respective taxpayers to organizations established to finance publicity programs designed to defeat initiative proposals in the States of Washington and Arkansas.

NO. 29

This is an action instituted to recover income taxes paid by taxpayers for the year 1948. The relevant facts found by the District Court (C. R. 44-47) may be summarized as follows:

Taxpayers were husband and wife and filed a joint income tax return for the year 1948. They owned a one-fourth interest in a partnership carrying on the wholesale distribution of beer under the trade name "Cammarano Brothers" in Tacoma, Washington (C. R. 44-45).

In 1948, the partnership paid \$3,545.15 to the Washington Beer Wholesalers Association, Inc., Trust Fund, of which taxpayers' proportionate share was \$886.29. The trust fund was established on December 17, 1947, by the Association, of which the partnership was a member, to help finance an extensive statewide publicity program on the part of wholesale and

retail beer and wine dealers (C. R. 45). The publicity program urged the defeat of "Initiative to the Legislature No. 13", which was submitted to the people of the State of Washington at the general election held on November 2, 1948, in accordance with the legislation provisions of the State Constitution. The Initiative would have placed the retail sale of wine and beer exclusively in state owned and operated stores (C. R. 45). The ballot title of the Initiative was as follows (C. R. 45): "An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties."

The proposal had previously been submitted to the state legislature, and an officer of the Beer Wholesalers Association kept close track of its progress, contacted many of the legislators, and urged its defeat. The legislature did not act on the proposal (C. R. 45-46).

When the proposal was submitted to the people as an initiative measure, the wholesale and retail beer and wine dealers determined to undertake a vast publicity program aimed at the voters. This program was directed by a committee composed of members of the various groups and associations interested in defeating the proposal and was financed by contributions from such groups and associations and other interested parties. The committee established to direct the program was known as the Industry Advisory Com-

mittee, which received contributions totalling \$231,257.10. Of this total, the sum of \$53,500 was contributed by the Beer Wholesalers Association, which collected it by assessing its members in accordance with their volume of business. The collections were handled through a trust fund established as a separate entity to receive and disburse the assessments. The publicity program was carried out by various types of advertising, none of which made reference to the wares or members of the Association as such. The proposal was defeated (C. R. 46).

Taxpayers deducted the sum of \$886.29 in their tax return for the year 1948 and this deduction was disallowed by the Commissioner, resulting in an increase in tax in the sum of \$153.98. After payment of this amount, this action for refund followed (C. R. 20-22).

The District Court found that the payments made by taxpayers to the trust fund were entirely for propaganda and aimed at the defeat of legislation and therefore concluded that such payments were not ordinary and necessary business expenses deductible under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 and Section 29.23 (o)-1 of Treasury Regulations 111 (C. R. 47-48). The Court of Appeals affirmed, holding that deduction of the payments was prohibited by the regulation relied upon by the District Court and that this regulation was a proper exercise of the rule-making power.²

² The Court of Appeals also held, on the basis of a finding by the District Court, that taxpayers had failed to sustain their burden of establishing that passage of the initiative would have impaired their wholesale beer business (C. R. 134-139).

In this case, taxpayer filed a petition in the Tax Court requesting a redetermination of a deficiency in income tax for the year 1950 in the amount of \$20,990.36. By stipulation of the parties, the only issue submitted to the Tax Court for determination was whether the payment by taxpayer in 1950 of \$9,252.67 to Arkansas Legal Control Associates, Inc., was deductible in computing income tax, either as an ordinary and necessary business expense under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 or as a contribution under Section 23 (q) of the 1939 Code. If taxpayer prevailed on that issue, a deficiency of \$6,500 was to be determined; if the Commissioner prevailed, the deficiency to be determined was \$10,386.12 (S. R. 3-4, 17-18). The facts found by the Tax Court (S. R. 26-30), many of which were stipulated (S. R. 10-23), may be briefly summarized as follows:

Taxpayer is a corporation which, in 1950, was engaged in the wholesale liquor business in Arkansas, its principal place of business being located in Little Rock. Taxpayer kept its books and prepared its tax returns on the accrual basis (S. R. 27).

The sale of liquor in Arkansas has been legal since 1935, subject to state laws providing for countywide option. An initiative petition calling for an election on a statewide prohibition act was circulated in Arkansas, filed with the Office of the Secretary of State, placed on the ballot, and voted on in the general election held in Arkansas on November 7, 1950. The

general purpose of the act was to make it unlawful to manufacture, sell, barter, loan, or give away intoxicating liquors within the State of Arkansas, or to export from, import to, or transport the same within the state (S. R. 27, 30).

In May of 1950, nine liquor wholesalers, including the taxpayer, organized Arkansas Legal Control Associates, Inc., as a nonprofit corporation under the laws of Arkansas (S. R. 25, 27). The purpose of the wholesalers in forming the corporation was to provide means of coordinating their efforts to persuade the general public to vote against the proposed statewide prohibition act (S. R. 29).

For the period from May 30, to November 30, 1950, Arkansas Legal Control Associates, Inc., received contributions totalling \$126,265.84, and disbursed over \$100,000 for direct advertising through newspapers, radio, billboards, book matches, bar banners, special folders, and press releases.* Such advertising con-

*On May 25, 1951, Arkansas Legal Control Associates, Inc., filed with the Commissioner an application for exemption under Section 101 (7) of the Internal Revenue Code of 1939, which exempts from taxation "Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual" (S. R. 29). This application for exemption was rejected by the Commissioner on October 11, 1951, in a letter which read in part as follows (S. R. 29):

Inasmuch as the evidence on file in this office shows that your sole function and activity consisted of engaging in activities designed to influence legislation, through the use of the radio, advertisements in newspapers and dissemination of literature, it is the opinion of this office



tained reasons and statistics designed to convince the voters that it was to the public interest to defeat the proposed prohibition act (S. R. 29-30). The balance of the contributions was disbursed for related expenses of supervising and coordinating the advertising (S. R. 30). At the election of November '7, the initiative measure was defeated (S. R. 30).

Taxpayer's contribution to Arkansas Legal Control Associates, Inc., amounted to \$9,252.67. On its income tax return for 1950, taxpayer deducted this amount from gross income as business expense. The Commissioner disallowed this deduction (S. R. 29-30).

The Tax Court, viewing the law as well settled in the light of *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, and subsequent decisions of the Courts of Appeals and the Tax Court, denied taxpayer's claimed deduction and determined a deficiency in the amount of \$10,386.12 (S. R. 30-32). In the Court of Appeals, taxpayer abandoned its contention that the payment was deductible as a contribution under Section 23 (q) of the 1939 Code. On petition for review, the Court of Appeals affirmed, holding, on the authority of

that you are not entitled to exemption from Federal income tax as a business league under the provisions of section 101 (7) of the Code, and that you are not an organization of the same general class as a chamber of commerce or board of trade within the meaning of Income Tax Regulations III [111], section 29.101 (7)-1. You will accordingly be required to file Federal income tax returns on Form 1120.

Contributions made to you are not deductible by the donors in computing their taxable net income in the manner and to the extent provided by section 23 (o) and (q) of the Code.

Textile Mills Corp. v. Commissioner, supra, as well as numerous decisions of the Courts of Appeals, that the regulation was valid, that it had been in existence for over forty years and had been impliedly approved by Congress, and that it barred the deduction claimed as an ordinary and necessary business expense (S. R. 38-44).

SUMMARY OF ARGUMENT

Taxpayers contend that their payments to organizations established to finance publicity campaigns aimed at the defeat of initiative legislation are "ordinary and necessary" business expenses deductible under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939. Treasury regulations since 1918, however, have precluded the deduction of sums "expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda." Such regulations are valid and are applicable to payments made to finance publicity campaigns designed to defeat initiative proposals.

A

1. The validity of the regulation here questioned was sustained by this Court in *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, under very similar circumstances. That case, as do these, involved no direct dealings with legislators (or "buttonholing" of Congressmen), but publicity activities designed to affect the passage of legislation. The regulation, as this Court noted, derived from rulings promulgated as early as 1915 and has been incorporated in income tax regulations in identical form ever since the Rev-

enue Act of 1918. It is a regulation issued as an interpretation of a statute which is not unambiguous, and is a valid exercise of the rule-making power conferred upon the officials charged with the responsibility of administering the revenue laws.

Not only did *Textile Mills* involve no direct dealings with members of Congress, but the publicity activities here involved were more directly designed to influence the promotion or defeat of legislation than those under review in that case. There, the publicity could only indirectly affect legislation by creating a body of public opinion which would influence the members of Congress, whereas here the publicity was addressed to and circulated among the legislators themselves, the voters of the States of Washington and Arkansas.

This Court, in *Textile Mills*, did not decide whether the contract to procure legislation, pursuant to which expenditures were made, was contrary to public policy. That question, in any event, is not controlling. The decisive issue is whether allowance of the deduction would contravene a defined legal policy expressed in a statute or regulation. *Commissioner v. Sullivan*, 356 U. S. 27, 29. A regulation expressing such a policy is involved here and precludes the deductions sought by the taxpayers.

2. The decision in *Textile Mills*, particularly when examined in the light of the facts involved, clearly upholds the validity of the challenged regulation as applied to a publicity campaign aimed at the promotion or defeat of legislation. This has been the view not only of the courts below in these cases, but of all courts which have considered the question.

3. The regulation in question, having been in existence for some forty years and during a period in which the underlying statutory provision has been repeatedly reenacted, has acquired the force of law. Not only has Congress never rejected the administrative interpretation thus placed upon the statute, but it has since incorporated like standards in the statutory provisions relating to the deduction of charitable contributions and the exempt status of organizations established for charitable and similar purposes.

4. The regulation is in direct accord with the long-established Congressional policy that political pressure activities designed to influence legislation be carried on without public subsidy or "subvention". Congress, since the Revenue Act of 1934, has denied deductions for contributions to charitable and similar organizations if a substantial part of their activities is "carrying on propaganda, or otherwise attempting to influence, legislation". The Revenue Act of 1934, and all subsequent Revenue Acts, have likewise denied exempt status to similar organizations substantially engaged in such activities. Congress has thus not merely forbidden the deductibility of the contributions actually used to influence legislation, but has prohibited the deduction of all contributions if the recipient organization is substantially engaged in activities aimed at influencing legislation. It would appear anomalous to permit the deductions as business expenses of payments to organizations established to finance publicity campaigns to promote or defeat legislation, when contributions to religious or charitable organizations may

not be deducted if a substantial part of the recipient organization's activities consists of attempts to influence legislation by similar means.

Numerous Congressional investigations have disclosed the influence and dangers, not only of direct lobbying, but of attempts to affect legislation by intensified advertising and other methods to "saturate the thinking of the community." Congress, in the statutory provisions referred to, has clearly demonstrated its intention that such activities shall not be subsidized through tax deductions. Taxpayers' position not merely conflicts with that policy, but would actually serve to aggravate the very problem which Congress sought to meet in enacting the legislation. At the present time, under the prevailing interpretation of Section 23 (a) (1) (A), any campaigns financed by industry to influence legislation cannot be charged to the Government by taking these expenses as a deduction. The financing is thus entirely out of the pocket of the concerns involved. This is equally true as to any citizens' organizations which might be formed to conduct similar campaigns, since contributions to these campaigns would not qualify as charitable contributions and accordingly are not deductible. The same is true of labor organizations. Thus a tax equilibrium exists. If the expenses of the business community were to become deductible, this tax equilibrium would be upset. While the business community could deduct their expenses, all others could not, *even with respect to the same legislation.*

The effect of such a change in the tax equilibrium would, moreover, be of particular benefit to the larger enterprises in the business community. The value of a deduction, in dollars and cents, depends on the tax rate applicable to the particular taxpayer. Thus, if a deduction were allowed for expenditures to influence legislation, the out-of-pocket cost of such expenditures would be sharply reduced for the businesses with large incomes (corporations, for example, would pay only 48¢ on the dollar, and many individual taxpayers would have an even lower net cost); but the smaller businessman would receive only slight benefit (his net cost would, for example, be 70¢ or 80¢ on the dollar).

Stated otherwise, the anomalous result of "public subvention" of such expenditures would be to *increase* the relative power of business enterprises (especially large ones), *vis-à-vis* private citizens and other taxpayers, to finance the "engineering of consent" on legislative matters. However, the pattern of Congressional action in this area indicates a Congressional purpose to reduce this disparity, not to increase it. In this delicate area, if any changes as above indicated are to be made, we submit that it is Congress—not the courts—which should make them.

5. Although no such contention was made in the courts below, taxpayers now suggest that, if the regulation be construed to preclude the deductions here claimed, a constitutional issue under the First Amendment may be presented since their publicity activities involve speech. The issue they pose is not a substantial one.

Only recently this Court pointed out (*Commissioner v. Sullivan*, 356 U. S. 27, 28) that "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." This statement, no doubt, is subject to the qualification that a grossly unreasonable classification of deductions will exceed constitutional limitations, particularly if the classification is "aimed at the suppression of dangerous ideas." See *Speiser v. Randall* 357 U. S. 513, 519. But that clearly is not this case. The regulation treats all legislation alike, regardless of the political party or pressure group; it does not single out any particular kind of legislation as good or bad, innocuous or dangerous, orthodox or radical. Nor does the regulation place any limit on the amount of money which can be spent on legislation or prescribe the manner in which it shall be spent. All that the regulation does is ensure that business organizations—no more than private citizens—shall not look to the Treasury to recoup the cost of influencing legislation.

The construction urged by taxpayers, moreover, would not avoid any constitutional issue. What is challenged is not merely the regulation, but the entire Congressional policy against "public subvention" of expenditures to influence legislation. This policy is expressed in statutory provisions not only prohibiting the deduction of contributions to charitable or similar organizations if they are substantially engaged in attempting to influence legislation, but also denying exempt status to those organizations which are substantially engaged in such activities.

1. Laws enacted as the result of initiative measures constitute, as taxpayers concede, "direct legislation by the people." Any attempt to avoid the application of the regulation in these cases upon the ground that initiative legislation differs from other forms of legislation is without substance. The initiative, as provided in the Constitutions of the States of Washington and Arkansas, is a reservation of legislative power by the people of those States, and the laws enacted thereby constitute legislation in the full sense of that term. The regulation does not attempt to distinguish between different types of legislation, nor have any of the courts which have considered the question. Taxpayers' position appears to be simply that the term "legislation", as used in the regulation, does not include "direct legislation."

If it be assumed that the adoption of the initiative and referendum were motivated by the desire to obtain freedom "from the control of money in politics," this purpose has not been accomplished here. The business enterprises vitally affected by the initiative proposals here involved expended large sums of money to secure the defeat of such proposals. Their expenditures differed from like expenditures on measures pending before legislatures only in that they required a publicity and advertising campaign directed to the voting public at large rather than to a limited number of legislators. The resources and motivations of self-interest remained the same. No difference in

principle has been suggested which would remove these financial pressures from the scope of a regulation precluding the deduction of sums expended for "the promotion or defeat of legislation."

Taxpayers' expenditures, moreover, were not only for "the promotion or defeat of legislation" but were also for "the exploitation of propaganda" within the meaning of the regulation. The publicity financed by them constituted "propaganda" within any accepted definition of that term, portraying as it did the initiative measures involved—for the sale of beer and wine in state stores in Washington and for prohibition in Arkansas—as leading to the return of the "speakeasy," "bootleggers," "gangsters," and "racketeers."

2. The regulation is not limited to "lobbying" activities (*i. e.*, direct dealings with legislators). To the extent that a distinction exists between such activities and other activities designed to influence legislation, it is recognized by the regulation which refers not only to sums expended for "lobbying" but also to sums expended for "the promotion or defeat of legislation, the exploitation of propaganda." The regulation thus contains the very language which this Court found lacking in the first clause of the Congressional resolution under review in *United States v. Rumely*, 345 U. S. 41. Nor was "lobbying", in the sense of direct dealings with legislators, before this Court when it sustained the applicability of the regulation to publicity activities in *Textile Mills Corp. v. Commissioner*, *supra*.

Even if the regulation could be said to be inapplicable to "open, honest, non-lobbying efforts," as taxpayers contend, the publicity campaigns involved here would not meet that test. Although the publicity was in large part financed by beer and wine wholesalers and liquor dealers, it appeared only under the aegis of "citizen" groups. Although well-known veterans and labor organizations and an association of state sheriffs were mentioned as interested parties, nowhere were the real sponsors disclosed. To the extent, therefore, that *Textile Mills* may be said to rest upon considerations of "secrecy" and "propaganda impossible to trace to its source," the advertising now under review is subject to like condemnation; it was neither "open" nor "honest" but was propaganda from an undisclosed source or from a source the true nature of which was not revealed.

ARGUMENT

TAXPAYERS' PAYMENTS TO ORGANIZATIONS ESTABLISHED TO FINANCE PUBLICITY CAMPAIGNS AIMED AT DEFEATING PROPOSED INITIATIVE LEGISLATION ARE NOT DEDUCTIBLE UNDER SECTION 23 (a) (1) (A) OF THE INTERNAL REVENUE CODE OF 1939

Taxpayers contend that their payments to organizations established to finance publicity campaigns aimed at defeating proposed initiative measures, relating to the liquor laws of the States of Washington and Arkansas, are deductible under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 55). This section permits the deduction of all "ordinary and necessary expenses paid

or incurred during the taxable year in carrying on any trade or business, * * *.”

As this Court has said (*Textile Mills Corp. v. Commissioner*, 314 U. S. 326, 338): “The words ‘ordinary and necessary’ are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation.” Compare *Commissioner v. Heininger*, 320 U. S. 467, with *McDonald v. Commissioner*, 323 U. S. 57.

Toward that end, Treasury regulations at least since 1918 have precluded the deduction of sums “expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses * * *” (emphasis added). Sections 29.23 (o)-1 and 29.23 (q)-1 of Treasury Regulations 111 (Appendix, *infra*, p. 57).

The validity of an identical regulation was upheld by this Court (*Textile Mills Corp. v. Commissioner*, *supra*), as well as by all the lower courts which have passed on the question (*infra*, p. 24). And these decisions, including the two here under review, have without exception sustained the applicability of the regulation to expenditures made for the purpose of financing publicity and propaganda campaigns for “the promotion or defeat of legislation,” including initiative and referendum proposals.

* This provision was carried over to Section 162 of the 1954 Code without substantive change.

Taxpayers, however, urge (A) that the regulation as applied by the courts below is invalid and (B) that, if valid, the regulation is not applicable here, either on the ground that it does not apply to expenditures to defeat initiative proposals, or on the ground that it applies only to "lobbying," i. e., direct dealings with legislators.

A. THE TREASURY REGULATION BARRING A DEDUCTION FOR SUMS "EXPENDED FOR LOBBYING PURPOSES, THE PROMOTION OR DEFEAT OF LEGISLATION, THE EXPLOITATION OF PROPAGANDA", IS VALID AS APPLIED HERE

1. *The validity of the regulation was sustained in Textile Mills Corp. v. Commissioner, 314 U. S. 326, which also involved expenditures to propagandize the general public with respect to legislative action*

An identical regulation was directly challenged before this Court in *Textile Mills Corp. v. Commissioner, supra*, a case which presented an entirely comparable factual situation. In that case, the taxpayer had contracted to render services looking toward the enactment of legislation by Congress providing for the return of enemy property seized during World War I. To this end, the taxpayer employed one Lee, a publicist, to prepare speeches, news items, and editorial comment. The taxpayer also employed two legal experts, Martin and Clark, to prepare propaganda on international relations, treaty rights, and this nation's policy with respect to alien property. The issue before this Court was the propriety of deducting, as ordinary and necessary business expenses, expenditures for the services of Lee, Martin, and Clark.

The taxpayer contended that the regulation unduly

narrowed the scope of the deduction provided by the statute and that the regulation was therefore invalid. This contention was explicitly rejected by a unanimous Court, stating (pp. 338-339):

Petitioner's argument that the regulation is invalid likewise lacks substance. The words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch v. Helvering*, 290 U. S. 111; *Deputy v. DuPont*, 308 U. S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible.

The Court also noted that the applicable regulation was derived from a Treasury decision, promulgated as early as 1915 (T. D. 2137, 17 Treasury Decisions 48, 57-58), and was thereafter incorporated in the successive regulations promulgated under the Revenue Acts since 1918.⁵

⁵ Taxpayers are in error when they assert (Br. 12, No. 29) that, "Unlike the regulation involved in *Textile Mills*, which had a long history, the present regulation dates only from 1938." The present regulation is identical in form to that under consideration in *Textile Mills*, the history of which is set forth in this Court's opinion (pp. 337-338). While it is now contained in Sections 29.23 (o)-1 and 29.23 (q)-1 of Treasury Regulations 111, promulgated under the 1939 Code, this reissuance of an identical regulation can hardly destroy the effect of its long history.

a. *The Textile Mills decision did not involve expenditures for direct dealings with legislators, as taxpayers erroneously contend*

Taxpayers here are in error when they assert (Br. 24-25, No. 29) that the *Textile Mills* decision also involved the services of one Mondell, an attorney employed to make proposals and suggestions to members of Congress to promote the enactment of legislation. This assertion is made by taxpayers in an attempt to show that the *Textile Mills* decision involved "lobbying" activities and not merely attempts to influence legislation indirectly by the use of publicity and propaganda.

However, not only is this Court's opinion silent as to Mondell, and the services performed by him, but the findings of the Board of Tax Appeals (38 B. T. A. 623) make clear that the only issues involved were deductions claimed for expenditures to Lee, Martin, and Clark. These findings state in part (p. 627):

It is now agreed between the parties that the amount credited to Mondell in 1929 was for legal services rendered "in connection with particular claims of petitioner's principal, after the enactment of the 'Settlement of War Claims Act of 1928' " and the deduction of that amount has been conceded by the respondent as proper. The respondent also concedes that the amount credited to Ivy Lee in 1929 and the amounts credited to Martin and Clark in 1930 were properly accrued on the petitioner's books for those years, but does not concede that they were deductible. *The deductibility of these items is the only matter left for our determination.* [Emphasis added.]

Similar statements are contained in the opinion of the Court of Appeals. 117 F. 2d 62, 64.

Taxpayers, in addition to their erroneous statements as to the issues involved in *Textile Mills*, also seek to create the impression (Br. 24, No. 29) that Mondell, a former Congressman and majority floor leader, performed lobbying activities on the floor of Congress, "availing himself of his floor privileges to buttonhole and to cajole legislators, including former colleagues" (Br. 26, No. 29). According to taxpayers, this description of Mondell's activities is "reflected in the *Textile Mills* record" (*ibid.*). The record in *Textile Mills*, however, contains nothing even remotely supporting such a description. In addition, as already noted, payments made to Mondell were not even in issue in *Textile Mills*.

Viewing *Textile Mills* in its true light, it becomes apparent that the decision involved no activities which might be characterized as "lobbying" in the sense of direct dealings with legislators. The expenditures there in question financed the dissemination to the general public of propaganda material in the form of speeches, news items, and brochures. The facts in the present cases are clearly comparable since they are similarly concerned with publicity activities designed to defeat legislation. In one sense, it may be said that the facts in the present case present an *a fortiori* situation when compared to those in *Textile Mills*. In the latter, the publicity disseminated to the general public could only indirectly influence legislation by creating a climate of public opinion to influence those

concerned with the passage of the desired legislation, the members of Congress. In the present cases, however, the activities were far more direct, since the publicity on the initiative proposals was aimed at the legislators themselves, namely, the voters of the States of Washington and Arkansas.

b. *The Textile Mills decision was not based on the illegality of any contract*

Taxpayers assert that this Court's decision in *Textile Mills* was based upon the fact that the contract to procure the enactment of legislation, as a result of which the expenditures there involved had been made, was contrary to public policy. This Court did not so hold, and in fact said that the question was "not material."⁶

Moreover, even assuming that the underlying contract in that case were contrary to public policy and hence unenforceable, that conclusion is without relevance. This Court has recently held that expenditures for services rendered in furtherance of a gambling business operated in violation of state law were not rendered nondeductible merely because of the illegal nature of the underlying business. *Commissioner v. Sullivan*, 356 U. S. 27. Such expenditures, this Court held (p. 29), are not rendered nondeductible except where "the allowance is a device to avoid the consequence of violations of a law * * * or otherwise

⁶ This Court stated (pp. 336-339): "Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist v. Child*, 21 Wall. 441; *Hazelton v. Sheekells*, 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material."

contravenes the federal policy expressed in a statute or regulation as in *Textile Mills Corp. v. Commissioner, supra.*"

It serves no purpose, therefore, to argue as taxpayers do (Br. 26-35, No. 29; Br. 22-24, No. 50) that the underlying contract in *Textile Mills* was illegal. That circumstance did not render the taxpayer's expenditures nondeductible. The determinative factor was, instead, the existence of the very regulation involved here. Cf. *Commissioner v. Heininger*, 320 U. S. 467, 470.

2. Lower court decisions have likewise sustained the validity of the regulation as applied to publicity campaigns for "the promotion or defeat of legislation," including initiative and referendum proposals

This Court's decision in *Textile Mills*, particularly when examined in the light of the facts presented by that case, stands clearly for the proposition that a regulation identical to the one involved here, when applied to a publicity campaign aimed at the promotion or defeat of legislation, is not contrary to the statute permitting deduction of ordinary and necessary business expenses and is a valid interpretation of the provisions of that statute. The decision in *Textile Mills* has been uniformly so interpreted not only by the courts below but by all other courts which have had occasion to consider the question. *Revere Racing Ass'n v. Scanlon*, 232 F. 2d 816 (C. A. 1st); *American Hardware & Eq. Co. v. Commissioner*, 202 F. 2d 126 (C. A. 4th), certiorari denied, 346 U. S. 814; *Roberts Dairy Co. v. Commissioner*, 195 F. 2d 948 (C. A. 8th), certiorari denied, 344 U. S. 965;

Sunset Scavenger Co. v. Commissioner, 84 F. 2d 453 (C. A. 9th); *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676 (C. A. 9th), affirmed on other issues, 293 U. S. 289; *Davis v. Commissioner*, 26 T. C. 49; *Wm. T. Stover Co. v. Commissioner*, 27 T. C. 434; *McClintock-Trunkey Co. v. Commissioner*, 19 T. C. 297, reversed on other grounds, 217 F. 2d 329 (C. A. 9th); *Mosby Hotel Co. v. Commissioner*, decided October 22, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,288).'

3. *The regulation has acquired the force of law by repeated reenactment of the statutory provision*

In the light of the repeated Congressional reenactment of the statutory provision under which the regulation was promulgated, the regulation has acquired the force of law. *Helvering v. Winmill*, 305 U. S. 79, 83; *Commissioner v. Flowers*, 326 U. S. 465, 469; *Boehm v. Commissioner*, 326 U. S. 287, 291-292. This principle has repeatedly been applied by the courts to the particular regulation here involved. *Textile Mills Corp. v. Commissioner*, *supra*, pp. 338-339; *Sunset Scavenger Co. v. Commissioner*, *supra*, p. 456; *Roberts Dairy Co. v. Commissioner*, *supra*, p. 950;

' But cf. *Smith v. Commissioner*, 3 T. C. 696. This case involved the adoption of a self-operative amendment to the Missouri Constitution and the Tax Court was of the opinion (p. 702) that "no legislation was needed or involved." The subsequent decisions of the Tax Court cited in the text, including its decisions in the *McClintock-Trunkey Co.* and *Mosby Hotel Co.* cases, *supra*, indicate that this distinction has for all practical purposes been rejected. Moreover, the *Smith* decision is of no relevance in this case involving an enactment which does not rise to the level of a constitutional amendment. And see note 19, *infra*.

American Hardware & Eq. Co. v. Commissioner, *supra*, pp. 129-130. See also *Commissioner v. Heininger*, 320 U. S. 467, 470; *Lilly v. Commissioner*, 343 U. S. 90, 95; *Commissioner v. Sullivan*, 356 U. S. 27, 28-29.

Taxpayers assert that the doctrine of reenactment is unreliable, citing *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, 431. But in that case, in which the doctrine was urged by the taxpayer, there was only one decision of the Board of Tax Appeals upon which to support the doctrine. Here the decisions in favor of the construction urged are numerous and authoritative (*supra*, pp. 24-25) and are based upon a regulation which has been in existence for over forty years.

As the Court of Appeals, in No. 50 stated (S. R. 42-43):

It is urged by taxpayer that the quoted regulation, if applicable, is invalid, and in this connection it is contended that as there has been no real re-enactment of the Internal Revenue Code since this regulation was approved by the Supreme Court in the *Textile Mills* case, *supra*, the question of its validity is still an open one and, hence, it is not entitled to the support of the principle that repeated Congressional re-enactment of the statutory provision to which a regulation pertains gives it the force and effect of law. The decision in the *Textile Mills* case was presumably well known to the Congress. The Congress has had many sessions since this decision was handed down and the regulation itself has been in

effect for nearly forty years, and presumably that fact was also well known to the Congress. Nevertheless, the Congress has passed no act rejecting the construction given this statute by this regulation. * * *

Indeed, not only has Congress passed no act rejecting the construction of this regulation, but since 1934, as we shall show (*infra*, pp. 28-29), it has incorporated like standards in the statutory provisions relating to the deduction of charitable contributions by individuals and corporations.

4. *The regulation is in accord with the long-established Congressional policy against "public subvention" of political pressure activities to influence legislation*

* In sustaining an identical regulation in the face of a direct challenge in *Textile Mills*, this Court found that the regulation contravened no Congressional policy. 314 U. S. at 338. It is demonstrable, we believe, not only that the regulation contravened no Congressional policy, but furthermore that it is in accord with an established Congressional policy.

The applicable principles were well stated some years ago by Judge Learned Hand. In *Slee v. Commissioner*, 42 F. 2d 184 (C. A. 2d), a case disallowing the deductibility of contributions to the American Birth Control League, one of the declared purposes of which was to effect the repeal of laws preventing birth control, he stated (p. 185): "Political agitation as such is outside the statute, however innocent the

aim, * * *. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.*

In *Textile Mills* this Court held that the regulation was a proper exercise of rule-making power, even though the statute there involved was the Revenue Act of 1928, which did not include any express statutory provision barring deductions for expenditures to promote or defeat legislation. However, as the Court noted (314 U. S. at 338, n. 18), Section 23 (q) of the Revenue Act of 1936 provided for deductions by corporations for sums contributed to corporations, trusts, funds, or foundations, organized and operated for religious, charitable, scientific or educational purposes, "*no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.*" (Emphasis added.) Identical provisions relating to contributions by individuals had been incorporated in Section 23 (o) of the Revenue Act of 1934, c. 277, 48 Stat. 680, and a provision relating to corporations had been added to that Act, as Section 23 (r), by Section 102 (c) of the

* It should be noted that the statutes involved in *Slee*, Section 214 (a) (11) (B) of the Revenue Act of 1921 and Section 214 (a) (10) of the Revenue Acts of 1924 and 1926, included no specific provisions denying deductions for contributions to organizations substantially engaged in attempting to influence legislation, but merely provided that the organization must be organized and operated "exclusively for religious, charitable, scientific, literary or educational purposes." The express provision relating to organizations substantially engaged in activities involving propaganda or influencing legislation originated with the Revenue Act of 1934.

Revenue Act of 1935, c. 829, 49 Stat. 1014 (later changed to Section 23 (q) of the Revenue Act of 1936, c. 690, 49 Stat. 1648). Identical provisions were incorporated in the 1939 Code as Sections 23 (o) and (q) (Appendix, *infra*, pp. 55-56).⁹ Section 101 (6) of the Revenue Act of 1934, and all subsequent Revenue Acts, have included provisions denying exempt status to corporations organized and operated for charitable, religious, educational, and similar purposes, if a substantial part of their activities include "carrying on propaganda or otherwise attempting, to influence legislation." See Section 101 (6) of the 1939 Code (Appendix, *infra*, pp. 56-57).

Thus, Congress did more than prohibit the deduction of expenditures which, as here, were actually made for the purpose of influencing legislation. Instead, Congress prohibited the deduction of contributions to charitable, religious, educational, and similar organizations—contributions which had always been encouraged—merely if a substantial part of the organization's activities included attempts to influence legislation, and further provided that such organizations would lose their tax-exempt status if they carried on such political activities.¹⁰ These stat-

⁹ The same provisions are now included in Section 170 of the Internal Revenue Code of 1954.

¹⁰ It is significant to note in this connection that the regulation in question has, almost from its inception, been incorporated in the provisions of the regulations relating to contributions. As previously noted, the first public ruling appeared as T. D. 2137, 17 Treasury Decisions 48, 57-58 (1915), declaring that sums expended for lobbying purposes and contributions for campaign expenses were not deductible by a corpora-

utory provisions, originating in the Revenue Act of 1934, show an established Congressional policy against "public subvention" of propaganda activities to promote or defeat legislation. At the very least, these provisions reflect a Congressional policy which is rel-

tion as an ordinary and necessary business expense. Article 143 of Treasury Regulations 33 (1918 ed.) provided that expenditures for the "promotion or defeat of legislation" were not deductible as ordinary and necessary business expenses.

The regulation first appeared in its present form in Article 562 of Treasury Regulations 45 (1919 ed.), promulgated under the Revenue Act of 1918, and has appeared thereafter without change in all successive regulations. See Article 562 of Treasury Regulations 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924 and 1926, Article 262 of Treasury Regulations 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, Article 23 (o)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 23 (q)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, Articles 23 (o)-1 and 23 (q)-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, Sections 19.23 (o)-1 and 19.23 (q)-1, 29.23 (o)-1 and 29.23 (q)-1, and 39.23 (o)-1 and 39.23 (q)-1 of Treasury Regulations 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939, and Section 1.162-15 of the Proposed Income Tax Regulations under the Internal Revenue Code of 1954.

Beginning with Treasury Regulations 45 (1919 ed.), this provision was incorporated for reasons of convenience in the article relating to corporate deductions, entitled "Donations." Prior to 1928, there were separate provisions in the Revenue Acts dealing with expenses allowable to individuals and expenses allowable to corporations, although the provisions were identical. See, *e. g.*, Sections 214 (a) (1) and 234 (a) (1) of the Revenue Act of 1926, 44 Stat. 9. Moreover, these early Revenue Acts provided for deductions by individuals for charitable contributions, but made no similar provision for corporations. However, it was recognized that such donations might, under some circumstances, qualify as "ordinary and necessary" business expenses of a corporation. Accordingly, there appeared

evant in construing the cognate provisions of Section 23 (a).

Certainly it would seem anomalous to hold, as taxpayers apparently urge, that a corporation's pay-

in the Regulations, under the statutory provisions relating to corporate donations, an article indicating when such donations were deductible as expenses. Since lobbying and other similar expenses were thought to be loosely related to donations, the provisions dealing therewith were likewise incorporated in the same article. It should be noted that this prohibition was not included during these many years in the articles of the Regulations dealing with charitable donations by individuals, although the articles dealing with individuals did refer to the articles relating to corporate donations. Thus, it is clear that the Regulations spelled out when such expenditures might or might not be deductible as "ordinary and necessary" business expenses.

In 1928, the structure of the revenue statute was simplified, and expense deductions for corporations and individuals were incorporated in a single section, namely, Section 23 (a). Under the reorganized structure, charitable contributions by individuals were dealt with in Section 23 (n). For functional reasons, it was considered to be more desirable to continue thereafter the prohibition against these deductions in the regulatory provisions dealing with corporate donations. Although the provision relating to the deductibility of donations by corporations had existed in the Regulations for many years, a similar prohibition was not included in the provisions of the Regulations dealing with individuals until 1939, and then by Article 23 (o)-1 of Treasury Regulations 101. Thus, it is clear from the origin of these provisions, as well as from their content, that they are concerned with the question of whether expenditures for lobbying purposes, the promotion or defeat of legislation, etc., are deductible as "ordinary and necessary" business expenses. This is further shown by the fact that in the Proposed Income Tax Regulations under the 1954 Code this prohibition is contained in Section 1.162-15, which is placed under Section 162, dealing with trade or business expenses, rather than under Section 170, dealing with charitable and other contributions by individuals and corporations.

ments to a group organized to finance publicity campaigns for "the promotion or defeat of legislation" are deductible under Section 23 (a) (1) (A) as ordinary and necessary business expenses, even though a contribution by the same corporation to a religious, charitable, or educational organization—no matter how praiseworthy—is not deductible under Section 23 (q) if any substantial part of the recipient organization's activities is "carrying on propaganda, or otherwise attempting, to influence legislation." In our view, by the enactment of these provisions, Congress demonstrated its intention that such activities should be completely withdrawn from the area of "public subvention," regardless of the form of the expenditure, and that the Treasury should not be a party to such activities by partially subsidizing such practices through the medium of tax deductions. See *Commissioner v. Sullivan*, *supra*, p. 29.

The background of these statutory provisions is illuminating. As early as 1913, activities designed to defeat the Underwood Tariff Bill provoked a Congressional investigation in which it was disclosed that the Beet Sugar Growers' Association and the Wholesale Grocers' Association had each spent over \$500,000 to influence the content of the bill and that 1,525,000 pieces of literature had been mailed under Congressional frank. Lane, *Some Lessons from Past Congressional Investigations of Lobbying*, 14 Pub. Op. Quar. 14 (1950). The House Committee charged, moreover, that the National Association of Manufacturers had carried on a propaganda campaign through newspapers, publicists, speakers and literature in

schools, colleges and civic organizations throughout the country. H. Rep. No. 113, 63d Cong., 2d. Sess., 51 Cong. Rec. 565-584, 566-567, 574. Again in 1929-1931, the Caraway Committee investigated activities designed to affect legislation, and its interim reports detailed the methods of expenditures and the techniques used by various groups in attempting indirectly to influence legislation. S. Rep. No. 43, 71st Cong., 1st Sess., Part 4 (American Taxpayers' League), Part 5 (sugar lobby), Part 7 (Muscle Shoals lobby).

In 1935-1936, shortly after the statutory provisions involved here were enacted (see *supra*, pp. 28-29), the Black Committee was authorized to investigate "all lobbying activities and all efforts to influence, encourage, promote, or retard legislation, directly or indirectly," in connection with the Public Utility Holding Company Act. (S. Res. 165 and 184, 74th Cong., 1st Sess.) In 1938 the Civil Liberties Committee of the Senate Committee on Education and Labor described a large-scale propaganda campaign undertaken to sway public opinion to support legislation in the field of industrial relations. The Committee referred to "[r]adio speeches, public meetings, news, cartoons, editorials, advertising, motion pictures" as "devices of molding public opinion [which] have been used without disclosure of [their] origin and financial support * * *." S. Rep. No. 6, Part 6, 76th Cong., 1st Sess., pp. 218-219.

In 1941, the Temporary National Economic Committee published its Monograph No. 26 entitled "Economic Power and Political Pressures," which dealt

with lobbying and propaganda techniques. It recommended (p. 194) disclosure of sources of funds and expenditures for public relations services, advertising, radio, etc. And in 1946 Congress enacted the Federal Regulation of Lobbying Act, c. 753, 60 Stat., 812, 839. Subsequent to that Act, there was established the Select Committee on Lobbying Activities of the House of Representatives. That Committee was informed, as earlier Committees had been, that the "buttonholing" of Congressmen was no longer a major problem in connection with lobbying. The major aspect of efforts to influence legislation were the indirect efforts to "make" public opinion in order to produce the demand for desired legislation, and it was said that "modern public relations counsel * * * use all the techniques of high-pressure publicity—press, radio, movies, advertising, pamphlets, books, magazines, exhibits—in an attempt to arouse legislative and public support for their programs." Hearings, House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., Part 1, p. 99. The magnitude of this problem is illustrated by the fact that those corporations which replied to questionnaires issued by this Committee admitted expending over 32 million dollars to influence legislation for the period from January 1, 1947, to May 31, 1950. Of this amount, over 31 million dollars was expended for the printing and distribution of publications, non-trade advertising, and contributions to trade organizations or associations. H. Rep. No. 3137, 81st Cong., 2d Sess., pp. 1, 61, 183, 255, 520.^{10*}

^{10*} And see New York Times, November 4, 1956, p. 76, col. 1, estimating that nearly two million dollars was spent for publicity in connection with just one of nineteen initiative measures on the California ballot in the 1956 election.

This history reflects a continued Congressional concern with the use of large sums of money to finance "the engineering of consent"¹¹—to "make" public opinion on matters of legislation—particularly where large economic interests are all on one side of the controversy.¹² The statutory provisions with respect to expenditures to influence legislation reflect a coordinate Congressional policy against "public subvention" of such activities through tax deductions or exemptions; as to such activities, "the Treasury stands aside from them." *Slee v. Commissioner, supra.*

The position urged by the taxpayers not only is in conflict with that policy, but would actually serve to aggravate the very problem which Congress sought to meet in enacting the legislation. At the present time, under the prevailing interpretation of Section 23 (a) (1) (A), any campaigns financed by industry to influence legislation cannot be charged to the Government by taking these expenses as a deduction. The financing is thus entirely out of the pocket of the concerns involved. This is equally true as respects any citizens' organizations which might be formed to conduct similar campaigns, since contributions to

¹¹ See Bernays, *The Engineering of Consent* (1955); Bernays, *The Engineering of Consent*, *Annals of the American Academy* (March 1947), p. 113; Dudley, *Molding Public Opinion Through Advertising, id.*, p. 105.

¹² The history of the related Congressional policy to try to keep federal elections "free from the power of money" is recounted in *United States v. Auto. Workers*, 352 U. S. 567, 570-578.

these campaigns would not qualify as charitable contributions and accordingly are not deductible. The same is true of labor organizations. Thus a tax equilibrium exists. If the expenses of the business community were to become deductible, this tax equilibrium would be upset. While the business community could deduct their expenses, all others could not.

Suppose, for example, that a citizens' organization had been established in the State of Washington for the purpose of financing a campaign *supporting* the initiative proposal involved in No. 29 to limit the sale of wine and beer to state-owned stores. Contributions to that organization would not be deductible. But, under taxpayers' construction, the liquor industry could deduct without limit their payments to organizations *opposing* the same measure.

Any such change upsetting the tax equilibrium, moreover, would particularly be of aid to the larger enterprises in the business community. The value of a deduction, in dollars and cents, depends on the tax rate applicable to the particular taxpayer. For example, the small businessman of modest income whose tax rate is only 20-30% realizes a tax saving of only 20-30% of the deductions claimed; in contrast, the businessman with an income ranging into the hundreds of thousands yearly, whose tax rate is 80-90%, realizes a tax saving of 80-90% of such deductions; while a corporation, by the same calculations, realizes a saving of 52%. Thus, the effect of the Congressional policy of

disallowing deductions for expenditures to influence legislation is, at least in some measure, an equalizing influence within the business community; all businesses alike bear the full burden of such expenses. On the other hand, if such a deduction were allowable, the out-of-pocket cost of such expenditures would be sharply reduced for the businesses with large incomes (corporations, for example, would pay only 48¢ on the dollar, and many individual taxpayers would have an even lower net cost); but the smaller businessman would receive only slight benefit (his net cost would, for example, be 70¢ or 80¢ on the dollar).

Stated otherwise, the anomalous result of "public subvention" of such expenditures would be to *increase* the relative power of business enterprises (especially large ones), *vis-à-vis* private citizens and other taxpayers, to finance the "engineering of consent" on legislative matters. As we have shown, the pattern of Congressional action in this area indicates a Congressional purpose to reduce this disparity, not to increase it. In this delicate area, if any changes as above indicated are to be made, we submit that it is Congress—not the courts—which should make them.

5. The First Amendment is not violated by the Congressional policy against "public subvention" of political pressure activities to influence legislation

Taxpayers suggest that if the regulation is construed to deny the deductions claimed, a substantial

constitutional issue 'under the First Amendment would be presented (Br. 44, No. 29; Br. 18, No. 50). On that basis, they urge that their construction of the regulation should be adopted for the purpose of avoiding the necessity of deciding the constitutional issue they pose. The issue, however, is not a substantial one. Taxpayers themselves did not regard the issue as sufficiently substantial even to warrant mentioning in the courts below;¹³ nor does it appear that the issue was raised in any other case in the 40-year history of the regulation.

The argument, as we understand it, is that Congress cannot permit the deduction of some expenditures as ordinary and necessary business expenses while at the same time denying the deduction to other expenditures on the ground that the money was used to influence legislation by financing publicity activities involving speech. Taxpayers (Br. 19, No. 50; Br. 44, No. 29) acknowledge that "even consideration of any constitutional problem" (*ibid.*) would be avoided if the regulation were construed to apply only to expenditures used to finance "lobbying—the exercise of personal influence, the use of personal solicitation" (Br. 31, No. 29); but such "lobbying" activities involve speech at least to the same degree as the advertising involved here. We also assume that taxpayers do not challenge the constitutionality of federal legislation limiting the amount of individual con-

¹³ Having failed to raise the issue below, taxpayers cannot do so for the first time in this Court. *E. g., Duignan v. United States*, 274 U. S. 195, 200.

tributions to finance the election campaigns of political candidates for federal offices;¹⁴ but if such legislation is valid, as we think it clearly is,¹⁵ then surely it is also valid to disallow a deduction for

¹⁴ The Federal Corrupt Practices Act requires every political committee to have a chairman and a treasurer who shall keep an account of all contributions and expenditures (2 U. S. C. 242), and shall report such data to the Clerk of the House of Representatives at stated times (2 U. S. C. 244). Anyone else who makes an expenditure aggregating more than fifty dollars within a calendar year for the purpose of influencing an election in two or more States is similarly required to report it to the Clerk of the House of Representatives (2 U. S. C. 245). Political candidates are also required to make statements to the Clerk of the House of Representatives concerning contributions and expenditures, the names of the persons involved, and any promises or pledges made by him relative to appointments either to public or private employment together with an identification of such person (2 U. S. C. 246). Finally, the Act limits to a definite sum the amount of expenditures which may be incurred by such candidate (2 U. S. C. 248). Other legislative provisions now contained in the Criminal Code limit individual contributions to candidates to \$5,000 during any calendar year, and prohibit even indirect benefits to such candidates through purchasing goods, commodities, advertising, or articles of any kind which would inure to the candidate's benefit, except in connection with "the usual and known business, trade, or profession of any candidate" (18 U. S. C. 608). No political committee is allowed to "receive contributions aggregating more than \$3,000,000, or make expenditures aggregating more than \$3,000,000 during any calendar year" (18 U. S. C. 609). And see note 15, *infra*.

¹⁵ Cf. *Burroughs and Cannon v. United States*, 290 U. S. 534; *United States v. United States Brewers' Association*, 239 Fed. 163 (W. D. Pa.). The latter decision upheld the validity of an outright prohibition (now contained in 18 U. S. C. 610) against any contributions by corporations in connection with federal elections. The court stated (pp. 168-169):

"And when we reflect that Congress is here dealing with elections at which Representatives in Congress are being voted

payments (as here) to finance publicity campaigns to influence legislation.

Only recently this Court pointed out (*Commissioner v. Sullivan*, 356 U. S. 27, 28) that "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." This statement, no doubt, is subject to the qualification that a grossly unreasonable classification of deductions will exceed constitutional limitations, particularly if the classification is "aimed at the suppression of dangerous ideas." See *Speiser v. Randall*, 357 U. S. 513, 519. But that clearly is not this case. The regulation treats all legislation alike, regardless of the political party or pressure group; it does not single out any particular kind of legislation as good or bad, innocuous or dangerous, orthodox or radical. Indeed, it is taxpayers themselves who would have the taxing authorities make a qualitative evaluation of different types of speech; they argue that the regulation does not apply to expenditures which are "completely free of taint from law or morals" (Br. 20, No. 50) or are "open, above-

for; that an election is intended to be the free and untrammelled choice of the electors; that any interference with the right of the elector to make up his mind how he will vote is as much an interference with his right to vote as if prevented from depositing his ballot; *that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election*; that any law the purpose of which is to enable a free and intelligent choice, and an untrammelled expression of that choice in the ballot box, is a regulation of the manner of holding the election—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence." (Emphasis added.)

board, legitimate" (Br. 32, No. 29), and even contend that the regulation is unconstitutional if otherwise construed (Br. 18, 20, No. 50).

The regulation is also unlike the statute in *Speiser*, *supra*, in that it does not require the taxpayers to execute a loyalty oath or to assume the burden of proving their loyalty. The regulation places no limit on the amount of money which can be spent on legislation or the manner in which it shall be spent.¹⁶ All that the regulation does is ensure that business enterprises—no more than private citizens—shall not look to the Treasury to recoup the cost of influencing legislation.

Not only is the regulation constitutional, but taxpayers are incorrect in asserting that adoption of their construction of the regulation would avoid the necessity of deciding the constitutional issue. Actually, what the taxpayers challenge here is, not merely the construction of a Treasury regulation, but rather the whole long-established Congressional policy against "public subvention" of political pressure activities to influence legislation. Pursuant to that policy, as we have shown (*supra*, pp. 28-32), Congress has repeatedly prohibited any deductions for contributions to a religious, charitable, educational, or similar organization if a substantial part of the organization's activities is "carrying on propaganda, or otherwise attempting, to influence legislation." Furthermore, in another section, Congress has provided

¹⁶ Compare the federal statutes governing contributions to political candidates. See note 14, *supra*.

for denial of the exempt status of organizations carrying on such political activity. Taxpayers have not suggested any reason why these two statutory provisions are any less vulnerable to constitutional attack than the regulation involved here. If there is no difference in this respect, then no constitutional issue would be avoided by adoption of taxpayers' construction of the regulation, and the alleged advantage of such a construction for that purpose is wholly illusory.

We submit that taxpayers' constitutional argument, not even made in the courts below,¹⁷ is without merit.

B. THE REGULATION IS APPLICABLE TO INITIATIVE LEGISLATION

1. *The regulation is not limited to indirect "legislation" by the legislature*

a. *The reference in the regulation to "legislation" also relates to direct legislation by the electorate*

Taxpayers concede (Br. 40, No. 29) that laws enacted by initiative or referendum constitute "direct legislation by the people" and that an initiative proposal when approved by the electorate becomes as much a part of the body of legislative law of a state as any enactment of the legislature. Nevertheless, taxpayers attack the decisions of the courts below upon the ground that they have mechanically applied dictionary definitions in holding that such laws constitute "legislation" within the meaning of the regulation.¹⁸

¹⁷ See note 13, *supra*.

¹⁸ Initiative is defined in Webster's New International Dictionary (2d ed.), p. 1280, as follows: "The procedure or device by which legislation may be introduced or enacted directly by the people, as in the Swiss Confederation and in many of the States of the United States."

Taxpayers (Br. 38-39, No. 29) characterize the decisions below as resting on the premise that "legislation is legislation"; if so, taxpayers' position appears to be that "direct legislation" is not "legislation."

It is axiomatic that our federal and state constitutions represent grants of power, including the legislative power, by the people. Amendment 7 of the Constitution of the State of Washington provides in pertinent part as follows:

• Art. 2 Section 1. *Legislative Powers, Where Vested.* The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, * * *.

Amendment 7 to the Constitution of the State of Arkansas is for all relevant purposes identical. Under these constitutions, the people granted legislative power to their legislatures but reserved to themselves the right to enact laws independent of the legislatures. The enactment of laws in such fashion is plainly an exercise of legislative power and the product cannot be considered as anything other than legislation. See *Senior Cit. L. v. Dept. Soc. Sec.*, 38 Wash. 2d 142; *Wallace v. Zinman*, 200 Cal. 585; *Kadderly v. Portland*, 44 Ore. 118; *Commonwealth v. Higgins*, 277 Mass. 191; *In re Opinion of the Justices*, 118 Me. 544; *Dawson v. Tobin*, 74 N. D. 713.

The regulation in terms refers to "legislation" and does not attempt to distinguish between various types of legislation. Not one of the courts which have considered the question, including the Tax Court, has suggested that initiative legislation is outside the scope of the regulation. *Revere Racing Ass'n v. Scanlon, supra*; *Sunset Scavenger Co. v. Commissioner, supra*; *Old Mission P. Cement Co. v. Commissioner, supra*; *Davis v. Commissioner, supra*; *McClinck-Trunkey Co. v. Commissioner, supra.*" And,

"Taxpayers find support only in the decision of the Tax Court in *Smith v. Commissioner*, 3 T. C. 606. That case, as previously noted, involved the adoption of a self-operative amendment to the Missouri constitution, and in the Tax Court's view (p. 702) "no legislation was needed or involved." The most that can be said for that decision is that the Tax Court made an erroneous distinction between legislation and amendments to a state constitution. Whatever validity that decision may have had has been vitiated by the more recent decision of the Tax Court in *Mosby Hotel Co. v. Commissioner*, decided October 22, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,288), which held that publicity undertaken for the enactment of a constitutional amendment repealing prohibition constituted the promotion or defeat of legislation. In any event, the Tax Court has consistently held in the cases cited above, as well as in its decision in No. 50 (28 T. C. 591), that initiative proposals constitute legislation within the meaning of the regulation here in question. Moreover, a constitutional amendment is not here involved.

As taxpayers note, the Commissioner's acquiescence in *Smith v. Commissioner, supra*, was withdrawn by Rev. Rul. 58-255, 1958-21 Int. Rev. Bull. 16. The withdrawal of that acquiescence was a recognition by the Commissioner that the distinction drawn between constitutional amendments and other forms of legislation was unsound and was not supported by the decisions of the courts which have interpreted the regulation. The fallacy of taxpayers' attack on this revenue ruling, because it purportedly ignores the illegality of an underlying

even as an original matter, it can hardly be regarded as unreasonable to deny the deduction to *both* expenditures to propagandize the general public with respect to legislative action by their representatives (as in *Textile Mills*) and expenditures to propagandize the general public with respect to legislative action by the people themselves (as here).

Whatever may have been the motivation for the adoption of the initiative and referendum in some of our states, the fact remains that laws enacted through

contract, has been discussed in the preceding portion of this brief (pp. 23-24, *supra*).

Taxpayers are also in error in seeking to inflate the significance of an acquiescence by the Commissioner in a particular Tax Court decision. See 1958-21 Int. Rev. Bull. 8:

"It is the policy of the Internal Revenue Service to announce in the Internal Revenue Bulletin at the earliest practicable date the determination of the Commissioner to acquiesce or not to acquiesce in a decision of The Tax Court of the United States which disallows a deficiency in tax determined by the Commissioner to be due. Notice that the Commissioner has acquiesced or nonacquiesced in a decision of The Tax Court relates only to the issue or issues decided adversely to the Government. Actions of the acquiescences in adverse decisions should be relied on by Revenue officers and others concerned as conclusions of the Service only to the application of the law to the facts in the particular case. Caution should be exercised in extending the application of the decision to a similar case unless the facts and circumstances are substantially the same, and *consideration should be given to the effect of new legislation, regulations, and rulings as well as subsequent court decisions* and actions thereon. Acquiescence in a decision means acceptance by the Service of the conclusion reached, and does not necessarily mean acceptance and approval of any or all of the reasons assigned by the Court for its conclusions. No announcements are made in the Bulletin with respect to memorandum opinions of The Tax Court." (Emphasis added.)

such methods constitute, as taxpayers concede (Br. 40, No. 29), "direct legislation by the people." If it be correct, as taxpayers assert, that these devices were adopted in order to obtain freedom "from the control of money in politics" (Br. 40, No. 29), it would seem that this purpose has not been accomplished here. The wholesale and retail wine and beer dealers in No. 29 expended the sum of \$231,257.10 for a program designed to defeat the initiative proposal in question. (C. R. 46.) The liquor wholesalers in No. 50 likewise expended over \$100,000 for a concentrated publicity program designed to defeat the initiative measure. Thus we have large sums of money expended by business enterprises to defeat proposed legislation, while apparently there were no similar interests advocating the adoption of the legislation. Freedom "from the control of money" is surely not achieved where the persons or corporations having the financial means to undertake to influence the electorate are all on one side of the issue.²⁰ And particularly in this so where, as here, the real source of the funds is effectively concealed from the general public (*infra*, pp. 51-53).

²⁰ In this connection, it is significant that in the State of Washington express statutory provision is made for circulating a pamphlet copy of the initiative measure, together with the arguments relating thereto, at state expense. Such pamphlet contains the arguments both for and against the measure, under appropriate equalized limitations. Revised Code of Washington, Sections 29.79.330-29.79.420.

b. *Taxpayers' payments, moreover, were for "the exploitation of propaganda" within the meaning of the regulation*

The regulation not only precludes the deduction of expenditures, for "the promotion or defeat of legislation" but also expenditures for "the exploitation of propaganda." Taxpayers' expenditures fall into both categories.

By portraying the Washington initiative providing for the sale of beer and wine in state stores as leading to the return of the "speakeasy", "bootleggers", "gangsters" and "racketeers" (accompanied by appropriately sinister illustrations) and as a measure advanced only by prohibitionists (C. R. 152-166), the advertisements in No. 29 constituted "propaganda" within any commonly accepted definition of that term. The advertisements in No. 50, while not as colorful in their presentation, similarly portrayed the results of the Arkansas activities as leading to the return of bootleggers, crime, and lawlessness (S. R. 14-16, 21, 23). Whether propaganda be defined as a "planned or concerted attempt to influence public opinion" or "to spread a particular doctrine or system of doctrines or principles" (*Seasongood v. Commissioner*, 227 F. 2d 907, 911 (C. A. 6th)), or whether it is "public address with selfish or ulterior purpose and characterized by the coloring or distortion of facts" (*ibid.*), the publicity program under review satisfied either definition. It can hardly be characterized as an open and objective presentation of facts from disclosed sources; it was a concerted attempt to influence

public opinion by colored facts from concealed sources which, had their identity been revealed, would have disclosed a selfish or ulterior motive (*infra*, pp. 51-53).

2. *The regulation is not limited to "lobbying" activities consisting of direct dealings with legislators*

a. *As the Textile Mills decision shows, the regulation also covers publicity campaigns aimed at the general public*

Taxpayers distinguish "lobbying—the exercise of personal influence, the use of personal solicitation" (Br. 31, No. 29)—from other activities designed to influence legislation, and argue that only "lobbying" is within the scope of the regulation involved here.

To the extent that such a distinction exists, however, it is recognized by the regulation, which is explicitly drawn to cover both types of activities. It precludes the deduction, not only of sums expended "for lobbying purposes," but also sums expended for "the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising and contributions for campaign expenses * * *." The latter terms must also be given effect according to their ordinary and natural meaning, and they clearly refer to activities other than "the exercise of personal influence, the use of personal solicitation." This has been the consistent interpretation of this language by the Courts of Appeals and the Tax Court. *Revere Racing Ass'n v. Scanlon*, *supra*; *American Hardware & Eq. Co. v. Commissioner*, *supra*; *Roberts Dairy Co. v. Commissioner*, *supra*; *Sunset Scavenger Co. v. Commissioner*, *supra*;

Old Mission P. Cement Co. v. Commissioner, supra; Davis v. Commissioner, supra; McClintock-Trunkley Co. v. Commissioner, supra; Wm. T. Stover Co. v. Commissioner, supra; Mosby Hotel Co. v. Commissioner, supra; Kirby v. Commissioner, 35 B. T. A. 578. Under the contrary interpretation urged by the taxpayers, the words "the promotion or defeat of legislation, the exploitation of propaganda" would be mere surplusage.

The fallacy of taxpayers' position on this issue is further demonstrated by *United States v. Rumely*, 345 U. S. 41, on which they rely. That case (p. 44) involved the interpretation of a Congressional resolution authorizing an investigation of

- (1) all lobbying activities intended to influence, encourage, promote, or retard legislation;
- and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation.

The Court held (p. 47) that publicity efforts "to saturate the thinking of the community" were not encompassed by the first clause of the resolution. But the Court also made it abundantly clear that there was no such omission with respect to the second clause (*supra*), relating generally to "activities * * * intending to influence, encourage, promote or retard legislation."²¹ This broader second clause is paralleled

²¹ The Court stated (p. 47):

"If 'lobbying' was to cover all activities of anyone intending to influence, encourage, promote or retard legislation, why did Congress differentiate between 'lobbying activities' and other 'activities * * * intended to influence'? Had Congress wished

in every respect by the regulation involved in the instant case. Like that clause, the regulation expressly includes expenditures for "the promotion or defeat of legislation" (and "the exploitation of propaganda"), in addition to "lobbying", and thus contains the very language which this Court found lacking in *Rumely*. See also *United States v. Harriss*, 347 U. S. 612.

As we have already shown (*supra*, pp. 19-22), the *Textile Mills* decision itself, like the *Rumely* decision, involved a publicity campaign "to saturate the thinking of the community." The deductions there at issue related to the preparation and dissemination of news items, speeches, editorials, and similar material—in other words, not direct dealings with legislators (or "bnttonholing"), but rather propaganda "directed at the entire body politic" (Pet. 9, No. 29). The expenditures represented compensation to three individuals—a publicist and two lawyers. None of the three, it appears, ever engaged in what the taxpayers call "lobbying, i. e., the exertion of pressures and persuasion on individual legislators * * *" (Pet. 9, No. 29) or "the exercise of personal influence, the use of personal solicitation" (Br. 31, No. 29). See 314 U. S. 326, 336; 38 B. T. A. 623, 625. Here, on the other hand, the taxpayers' efforts "to saturate the thinking of the community" were directed at the

to authorize so extensive an investigation of the influences that form public opinion, would it not have used language at least as explicit as it employed in the very resolution in question in authorizing investigation of government agencies?"

legislators themselves, the people of the States of Washington and Arkansas.

b. *Even if the regulation were inapplicable to "open, honest, non-lobbying efforts," as taxpayers contend, their payments would not qualify under that test.*

The taxpayers in No. 29 not only seek to read the *Textile Mills* decision as involving "buttonholing," but they also urge that the decision turned on considerations of "secrecy" (Br. 33, No. 29) and "propaganda impossible to trace to its source" (Br. 26, No. 29). As we have shown (*supra*, pp. 19-22), there is no basis for such a reading of *Textile Mills*. Indeed, the taxpayer in No. 50 expressly "recognizes that, with a minor exception not worth noting, there was no insidious activity on the part of the taxpayer in that case" (Br. 22, No. 50).

Moreover, even if we were to assume that *Textile Mills* did rest upon considerations of "secrecy" and "propaganda impossible to trace to its source," the facts in these cases do not show any significant divergence. Involved here, according to taxpayers, are "open, honest, non-lobbying efforts directed at legislation" (Br. 26, No. 29; see also Br. 20, No. 50). Although we certainly agree that the taxpayers' publicity campaigns were "directed at legislation" (see *supra*, pp. 42-46), we doubt that the campaigns can be said to meet the test of "open, honest non-lobbying efforts," even assuming that such a test governed deductibility.

As the District Court found in No. 29 (R. 46):

The program was carried out by various types of advertising none of which had reference to the wares or members of the Association as such.

A brief glance at the examples of advertising utilized discloses that nowhere does it appear that the campaign was sponsored by beer and wine wholesalers or retailers or any others who had a financial interest in the legislative result. Instead, such advertising appeared under the aegis of "Men and Women Against Prohibition" or the "Citizens Liquor Control Council, Inc." (C. R. 151-182). Although the Veterans of Foreign Wars, the American Legion, the Washington Federation of Labor, the Seattle Central Labor Council, and the Washington State Sheriffs' Association are mentioned as interested groups (C. R. 155), there is no disclosure of interest on the part of the beer and wine retailers or wholesalers, the Wholesalers Association, or the Industry Advisory Committee. Similarly, the advertising in No. 50, financed in substantial part by Arkansas Legal Control Associates, Inc., an association of liquor wholesalers (S. R. 27-30), appeared under the disclosed sponsorship only of "Arkansas Against Prohibition", described simply as a group of citizens (S. R. 14-16, 21, 23). The financial support and interest of liquor wholesalers, such as taxpayer in No. 50, remained untraceable.

The advertising now under review, therefore, is subject to the same condemnation as propaganda from an undisclosed source or from a source whose true nature is not revealed, and it involves many of the evils which taxpayers assert to be encompassed

within the term "lobbying." It was far from the "open, honest" presentation claimed by taxpayers. Certainly the presentation of arguments against prohibition by undisclosed beer and wine or liquor wholesalers is neither "open" nor "honest"; and as a result the voters were precluded from considering the merits of the arguments in the light of their true source.

In *United States v. Harriss*, 347 U. S. 612, 625, this Court stated:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. * * *

For the same reasons, a comparable "ability to properly evaluate such pressures" is no less important when, as here, the people themselves act as legislators.²²

²² Cf. Mr. Justice Black, dissenting in *Viereck v. United States*, 318 U. S. 236, 251:

"* * * Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather

CONCLUSION

For the reasons stated, it is respectfully submitted that the decisions of the courts below are correct and should be affirmed.

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OCTOBER 1958.

than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose."

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * *

(c) [As amended by Section 224 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Charitable and Other Contributions.*—In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

* * * * *

(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes; or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * *

(q) [As amended by Section 224 (b) of the Revenue Act of 1939, *supra*; Section 125 of the Revenue Act of 1942, c. 619, 56 Stat. 798; Section 114 of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Charitable and Other Contributions by Corporations*.—In the case of a corporation, contributions or gifts payment of which is made within the taxable year to or for the use of:

(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States, or of any State or Territory, or of the District of Columbia, or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, veteran rehabilitation service, literary, or educational purposes or for the prevention of cruelty to children, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; * * *

(26 U. S. C. 1952 ed., Sec. 23)

SEC. 101 [As amended by Section 301 (b) of the Revenue Act of 1950, c. 994, 64 Stat. 906; Section 314 (b) of the Revenue Act of 1951, c. 521, 65 Stat. 452]. EXEMPTIONS FROM TAX ON CORPORATIONS.

Except as provided in paragraph (12) (B) and in supplement U, the following organizations shall be exempt from taxation under this chapter—

(6) Corporations, and any community chest, fund, or foundation, organized and operated ex-

clusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation * * *

(26 U. S. C. 1952 ed., Sec. 101)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23 (o)-1. *Contributions or Gifts by Individuals.*—* * *

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

SEC. 29.23 (q)-1. *Contributions or Gifts by Corporations.*—* * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

PETITION OF THE RESPONDENTS FOR REHEARING

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August 22, 1958.

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*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

PETITION.

The respondents petition the Court for rehearing herein.

Grounds for the requested rehearing.

The grounds for the petition are as follows:

1. The basic issue in these cases was one of fact as to the purpose for which Order L-208 was promulgated. That issue was determined in favor of the respondents by the Court of Claims, which found that the sole objective of the Order was "*the releasing of mine labor from the gold mines*"¹ for employment in mines that were producing other metals". This Court has held that in fact the primary purpose of L-208 was "*to conserve the limited supply of equip-*

¹ Italics are supplied herein unless otherwise indicated.

ment used by the mines". On the basis of that conclusion of fact the Court has ruled that L-208 was a "reasonable regulation" to conserve mining equipment.

2. The Finding of the Court of Claims as to the purpose of L-208 is overwhelmingly supported by the record.

3. This Court's holding as a matter of fact that it was the primary purpose of L-208 to release scarce mining equipment for use in essential industries is in direct conflict with the Finding of the Court of Claims, wholly without support in the record, and incorrect in fact.

4. This Court does not appear to have held that it was a purpose of L-208 to conserve *critical materials*, such as "mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc." or "mercury, drill steel, etc.", as distinguished from *mining equipment (including machinery)*. The Finding of the Court of Claims that L-208 was not issued for the purpose of conserving critical materials is overwhelmingly supported by the record.

5. This Court has held as recently as 1949, in *United States v. Penn Foundry & Manufacturing Co. Inc.*, 337 U. S. 198, 207-208, that this Court has only a limited power of review of judgments of the Court of Claims in Tucker Act cases, and that, with certain exceptions specified in *Penn Foundry & Manufacturing Co. Inc.*, this Court is bound by findings of fact of the Court of Claims. In effect, however, the Government sought and obtained a trial of these cases *de novo* in this Court, which reached a conclusion as to the purpose of L-208 for which there is no support in the record.

6. L-208 cannot be sustained as a regulation. It was not in fact issued as a regulation of mining equipment and it cannot be sustained as a regulation of mine labor because there was no authority to regulate such labor. In fact and law the closing of the gold mines was a "taking", effected in order to maneuver manpower.

The respondents' case is based squarely on the propositions that, as the Court of Claims found, the only purpose for which L-208 was promulgated was "the releasing of mine labor from the gold mines for employment in mines that were producing other metals" (Finding 46, R. 105-106);² that the reference in the preamble of the Order to "critical materials" was camouflage;³ and that, as the Court of Claims said (R. 145), "what the WPB said it was doing and what it in fact and law did were two different things".⁴

This Court's reversal rests upon a holding by this Court that in fact the primary purpose of L-208 was "to conserve the limited supply of equipment used by the mines", although the WPB also "hoped that its order would divert miners to more essential work" (357 U. S. p. 169). On the basis of that conclusion of fact, the Court ruled that L-208 was a "reasonable regulation" to conserve the limited supply of equipment used by the mines (*id.*).⁵

² The Court of Claims spoke in Finding 46 of "*The dominant consideration . . . in the issuance of Limitation Order L-208*" (R. 105-106). In speaking of "*The dominant consideration*", the Court clearly meant the *only* purpose of the Order (Respondents' brief, Appendix A, p. 34-39; see also dissenting opinion of Mr. Justice Harlan, 357 U. S. 179-180).

³ Respondents' brief, p. 3-4, 30-34, 70, 97-101.

⁴ Respondents' brief, p. 33 and Appendix A thereto, p. 36.

⁵ The Court's opinion says (p. 169):

"The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines and it hoped that its order would divert available miners to more essential work."

The opinion also says that (p. 167):

"The record shows that a dominating consideration in the issuance of L-208 was the expectation that it would release experienced miners for work in the nonferrous mines, but the record does not support a finding that such was the sole purpose of the order." (*Italics in the original*).

II.

The Finding of the Court of Claims that the purpose for which L-208 was issued was "the releasing of mine labor from the gold mines for employment in mines that were producing other metals" is overwhelmingly supported by the record.

The documentary evidence and uncontradicted oral testimony leave no doubt as to the correctness of what the Court of Claims said in its opinion (R. 19):

"The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines."

The Order was issued on October 8, 1942 (Finding 43, R. 102). The contemporaneous record discloses its purpose.

On October 1, 1942, five days before the WPB meeting at which the issuance of L-208 was formally decided upon (Finding 41, R. 100-101), representatives of the gold mine operators were called to Washington and told by the Vice Chairman of the WPB "that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines" (Finding 36, R. 97-98). They met for five hours with representatives of the WPB, the War Department and the War Manpower Commission. The meeting was concerned *solely* with the question whether manpower needs made it necessary and appropriate to issue an order closing the gold mines. There was no discussion at all of the possibility of issuing such an order for any other purpose (Finding 36, R. 97-98; R. 605-611).

The minutes of the meeting of the WPB held on October 6, 1942, at which it was agreed that the closing order should be issued, confirm that the purpose of the Order

was to put gold miners out of work so that they "would be released for work elsewhere" (Finding 41, R. 100-101). There is no suggestion in the minutes that L-208 had any other purpose.

Moreover, the record contains four explicit contemporaneous statements of the "manpower" purpose of the Order which were made, respectively, by (1) the Chairman of the WPB and the Chairman of the War Manpower Commission, jointly, (2) the Under Secretary of War, (3) the Commanding General, Services of Supply, United States Army and (4) the Chief of Staff of the United States Army.

- 1) Plaintiff's Exhibit 34, R. 430, 1323—Joint statement of Paul V. McNutt and Donald M. Nelson, issued October 8, 1942 (Finding 45, R. 105):

"To meet our war production program with respect to these [nonferrous] metals, it becomes necessary now to maneuver our manpower so that less essential mining can be diverted to vitally important operations. With this as our objective it has been determined that all gold mining shall be discontinued at the earliest possible moment."

- 2) Plaintiff's Exhibit 132, R. 612-613, 1516—Telegram, October 10, 1942, Under Secretary of War to Homestake Mining Company:

"FACED WITH A SERIOUS SHORTAGE OF COPPER AND MOLYBDENUM FOR OUR ARMAMENT PROGRAM STOP THE WAR PRODUCTION BOARD HAS ORDERED THE CLOSING OF GOLD MINES TO PROVIDE ADDITIONAL TRAINED LABOR FOR THE NON FERROUS METAL MINES STOP * * *"

- 3) Plaintiff's Exhibit 127, R. 520, 1510-1511—Letter, October 11, 1942, General Somervell to Senator Gurney:

"The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort."

- 4) Plaintiff's Exhibit 128, R. 523, 1511-1512—Letter, October 12, 1942, General Marshall to Senator Gurney:

"It is my understanding that the War Production Board has ruled that the gold mining industry be closed down in the hopes that this action will release experienced mine labor for employment in the mining of the basic strategic materials essential to our war production program."

The foregoing are only some of the items which constitute the overwhelming support in the record for the Finding of the Court of Claims as to the purpose for which L-208 was issued.* In Appendix A hereto we quote, from the Findings, ten statements made in writing by responsible Government officials over the period from July 4, 1942, through October 5, 1942 which confirm the "manpower" purpose of the Order.

III.

This Court's opinion holds that it was the primary purpose of L-208 to release *scarce mining equipment* for use in essential industries and the Court concluded that "The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines . . ." (p. 169).

The statements in the opinion are in direct conflict with the Finding of the Court of Claims, wholly without support in the record, and incorrect in fact. This Court appears to have relied upon unsupported assertions in the petitioner's brief.

This Court said in its opinion (p. 166):

"The record shows that the WPB expected that L-208 would release substantial amounts of scarce

* See respondents' brief, p. 3, 13-18, 44, 68 and Appendix A thereto, p. 2-39.

mining equipment for use in essential industries”

There is no evidence that, in issuing L-208, the WPB had any such expectation.

In its opinion this Court also said (p. 167):

“The WPB could properly rely on the profit motive to induce the mine owners to liquidate their inventories, and it was thought that the people who would be interested in purchasing used mining equipment probably would be the owners of essential mines.”

There is no evidence that before issuing L-208 the WPB ever gave thought to the question whether the owners of essential mines would be interested in purchasing used mining equipment or gave any consideration to the question whether the profit motive would induce mine owners to liquidate their inventories.

This Court also said (p. 168):

“Thus the WPB made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of war-time resources that it must be temporarily suspended.”

There is no evidence that when issuing Order L-208 the WPB decided that the unrestricted use of mining equipment was so wasteful of war time resources that it ought to be suspended.

At no time has the Government cited, and this Court's opinion does not cite, any evidence in the record, written or oral, which even suggests that when the WPB issued L-208 it acted in the expectation that the Order would release significant amounts of scarce mining equipment for use in essential industries.

Findings 18 through 42, which take up 27 pages of the record and embody full quotations from the pertinent documents of the three months preceding the issuance of L-208, as well as from the minutes of the WPB meeting of October 6, 1942 at which the issuance of the Order was decided upon, contain no significant reference to mining equipment (R. 75-102).⁷

The Government did not contend before the Court of Claims, or in its petition for certiorari, that it was a purpose of L-208 to release scarce mining equipment; that contention was made for the first time in the Government's brief on the merits, in which the Government relied for the first time on Priorities Regulation 13 and two amendments of L-208 which were adopted on November 19, 1942 and August 31, 1943.⁸ The thesis advanced in the Government's brief that Priorities Regulation 13 (which is not in the record and was not discussed before the Court of Claims) restricted sales of mining equipment by the gold mines is untenable and is not referred to in this Court's opinion (see Appendix B hereto). The two amendments of L-208, which are mentioned in the opinion, have no tendency to establish that in issuing the Order the WPB acted in the expectation that the Order would release scarce mining equipment (see Appendix B hereto).

While a minute of the WPB meeting of June 15, 1943 indicates that at that time the WPB took cognizance of a relatively small diversion of used mining equipment to

⁷ In the minutes of the WPB meeting of October 6, 1942, there is no reference whatever to mining equipment (Finding 41, R. 100-101). Nor is there any in the long Finding about the 5-hour meeting of October 1, 1942, attended by representatives of the Government and the gold mining industry, which was called to tell the owners of the gold mines about the proposal to close down the mines (Finding 36, R. 97-98).

The only references to equipment in the other Findings have no significance in determining the purpose of Order L-208 (R. 88, last par.; R. 92, lines 7-9).

⁸ Respondents' brief, p. 60-62.

essential industries which had taken place in the eight months following the issuance of the Order, that evidence does not afford any support for the proposition that L-208 was issued for the purpose of releasing mining equipment or in the expectation that it would do so. (see Appendix C hereto). It is not referred to in this Court's opinion.

IV.

We do not interpret this Court's opinion as holding that it was a purpose of L-208 to conserve *critical materials*. The Court's opinion repeatedly refers explicitly to *mining equipment*, as distinguished from *critical materials*. The distinction is important and it was clearly made by the parties.

In any event, the record would not support a finding that L-208 had a *critical materials* purpose, although the preamble to the Order stated that it did.

The Commissioner of the Court of Claims, that Court's hearing officer, included the following statement in a finding (R. 7-8):

"Another consideration in the issuance of the order was as stated in the preamble that the fulfillment of requirements for the defense of the United States had created a shortage in the supply of *critical materials* which had been used in the maintenance and operation of gold mines."

The Court of Claims struck this statement from its Finding (R. 105-106), thus rejecting the Commissioner's view that one of the purposes of L-208 was to conserve *critical materials*.

Critical materials, such as "mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc." and "mercury, drill steel, etc." (R. 92), are to be distinguished from *mining equipment (including machinery)*. The distinction was explicitly made in the Government's brief on the merits, which asserted, in the statement of the question

presented, that L-208 was issued "to conserve *scarce war materials*, to divert *mining machinery and equipment* to essential wartime enterprises, and to bring about the voluntary relocation of manpower to vital mining activities and essential war work" (p. 2). The respondents agreed with the Government that the words "critical materials" or "materials", as used by the WPB, did not include "mining machinery and equipment".⁹

This Court's opinion indicates that the Court distinguished advisedly between critical materials and mining equipment. In the discussion of the merits the opinion refers specifically to *mining equipment* ("equipment", "mining equipment", "scarce equipment", or "scarce mining equipment") no less than 12 times (p. 165).¹⁰ The opinion nowhere states that L-208 was issued in order to conserve *critical materials*.

The Finding of the Court of Claims that L-208 was not issued for the purpose of conserving critical materials is overwhelmingly supported by the record.¹¹

V.

The procedure prescribed by the Congress for cases under the Tucker Act calls for the resolution of issues of fact by the Court of Claims and authorizes only a limited review of judgments of the Court of Claims by this Court, which is bound unless (1) "there is a lack of substantial evidence to sustain a finding of fact", (2) "an ultimate finding or findings are not sustained by the findings of

⁹ Respondents' brief, p. 60-62 and Appendix A thereto, p. 1-2.

¹⁰ On the other hand, in the discussion of the merits in the opinion the only mention of *materials*, as distinguished from *equipment*, are (1) a brief summary of the contention of the respondents with respect to the preamble to L-208 (p. 166), and (2) a statement that: "It was lawful for the WPB to consider the impact of its material orders on the manpower situation" (p. 167).

¹¹ See respondents' brief, p. 11-18, 30-37, 97-101 and Appendix A thereto, p. 2-39, 45-54.

evidentiary or primary facts" or (3). "there is a failure to make a finding of fact on a material issue". *United States v. Penn Foundry & Manufacturing Co., Inc.* (1949) 337 U. S. 198, 207-208.¹²

In this case the prescribed procedure was followed in the Court of Claims, which gave the most painstaking consideration to the issues of fact, including the dominant issue as to the purpose of L-208. The majority of the Court of Claims joined in finding that the sole purpose of L-208 was to throw the gold miners out of work in the hope that they would go to essential mines. The ultimate Finding to that effect (Finding 46, R. 105-106)¹³ was preceded by 28 Findings of evidentiary or primary facts (R. 75-105), which afford overwhelming support for the ultimate Finding. While Judge LARAMORE dissented from the judgment of the Court of Claims on the ground that L-208 was unauthorized, he did not indicate any disagreement with the majority as to the purpose of the Order (R. 61). And while the opinion of Chief Judge JONES, also dissenting, contains references to "critical materials" and "strategic materials", it does not contain anything remotely similar to what is said in this Court's opinion about mining machinery (R. 58-61).

It would seem that during the prolonged and exacting litigation in the Court of Claims both the litigants and that Court were entitled to assume that this Court would respect the rules enunciated, as recently as in 1949, in *Penn Foundry & Manufacturing Co., Inc.*

In effect, however, the Government sought and has obtained a trial on the facts *de novo* in this Court, in which the Government was not limited to the record or arguments made below.

¹² This Court's discussion in Note 4 to the opinion in *Penn Foundry & Manufacturing Co. Inc.*, 337 U. S. at p. 207-208, was quoted in full in the respondents' brief herein at p. 63-64.

¹³ See Note 2 above.

This Court's opinion does not even acknowledge that the Court of Claims made an explicit Finding on the all-important question as to the purpose of the Order."

This Court has reached a conclusion, as to the purpose of L-208, for which there is no support in the record. As contrasted with the 28 Findings made by the Court of Claims as to evidentiary or primary facts, this Court's opinion does not cite a single evidentiary or primary fact to support its conclusion that "the WPB expected that L-208 would release substantial amounts of scarce mining equipment for use in essential industries" (p. 166). Assertions in the Government's brief take the place of the Findings of the Court of Claims, the Court to which the Congress committed the primary responsibility to determine the facts.

The Government may contend that even if this Court had considered itself bound by the Finding of the Court of Claims as to the purpose for which Order L-208 was issued, a majority of the Court might not have agreed with Mr. Justice HARLAN on the points of law discussed in his dissenting opinion (p. 179-184). Such a contention should not avail to prevent a rehearing. For the respondents are entitled to have the issues of fact first correctly disposed of. The Court's opinion states (p. 168):

"Traditionally, we have treated the issue as to whether a particular Governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case."

"This Court's opinion states (p. 167):

"The record shows that a dominating consideration in the issuance of L-208 was the expectation that it would release experienced miners for work in the nonferrous mines, but the record does not support a finding that such was the sole purpose of the order." (*Italics in original.*)

Otherwise there is no reference in the opinion, direct or indirect, to any Finding of the Court of Claims.

It does not appear that a majority of the Court considered whether, if this Court did not disturb the Findings of Fact of the Court of Claims, it should affirm that Court's judgment that there was a constitutional taking.

VI.

The basis for this Court's reversal of the judgment of the Court of Claims was stated in the last paragraph of its opinion (p. 169):

"The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines and it hoped that its order would divert available miners to more essential work. Both purposes were proper objectives; both matters were subject to regulation to the extent of the order."

As we have shown, the Court's holding that "The WPB here sought * * * to conserve the limited supply of equipment used by the mines" is in direct and irreconcilable conflict with the Finding of the Court of Claims, is not supported by any evidence, documentary or oral, and is incorrect in fact.

The implication that the diversion of "available miners to more essential work" was "subject to regulation to the extent of the order" was presumably intended merely to carry out the thought, previously stated in the opinion (p. 167), that when issuing a lawful regulatory order the WPB could properly "consider the impact" of the Order "on the manpower situation". The WPB had no regulatory authority to divert labor. That was acknowledged by the Chairman of the WPB at the time (Finding 24, R. 81). Since there was no lawful authority to regulate mine labor, the closing of the gold mines cannot be regarded as incidental to the Government's lawful regulation of such labor.

It follows that the closing of the gold mines was not incidental to a regulation, whether of mining equipment or of mine labor, but was a "taking" effected in order to maneuver manpower.

CONCLUSION.

Your petitioners pray that a rehearing be granted and that, upon such rehearing, the judgment of the Court of Claims be affirmed.

Dated, August 22, 1958.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a re-hearing is presented in good faith and not for delay.

Dated, August 22, 1958.

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Counsel for Respondents.

APPENDIX A

**Statements quoted in the Findings of the Court
of Claims which confirm the "manpower" purpose
of Order L-208.**

The following statements are taken from the Findings of the Court of Claims, being excerpts from documents quoted therein:

- 1) Report of War Department Committee, submitted July 8, 1942 (Finding 19, R. 76):

"Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort."

- 2) Memorandum of Acting Chief of Priorities Branch of the Labor Production Division, WPB, to Director of Operations, War Manpower Commission, sent July 4, 1942 (Finding 20, R. 77):

"Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, . . ."

- 3) Memorandum of the General Counsel of War Manpower Commission to a member of his staff, sent July 9, 1942 (Finding 21, R. 78):

"General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; . . ."

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- 4) Minutes of the WPB of September 1, 1942 (Finding 25, R. 83):

"As further steps in halting out-migration, . . . an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; . . ."

- 5) Memorandum of Chief of Miscellaneous Minerals Branch, WPB, to Deputy Director General for Industry Operations, WPB, sent September 9, 1942 (Finding 27, R. 85):

"It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials."

- 6) Minutes of the WPB Interdepartmental Committee on Non-Ferrous Metals for September 15, 1942 (Finding 30, R. 93-94):

"In this connection, since the primary purpose of the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission."

- 7) Memorandum from Special Assistant to Chairman of the WPB to Chairman of the WPB, September 15, 1942 (Finding 31, R. 95):

"Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."

- 8) Memorandum of Vice Chairman of the WPB to Deputy Director General for Industry Operations, WPB, sent September 15, 1942 (Finding 34, R. 96-97):

Appendix A

"It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident."

- 9) Letter of Under Secretary of War to Vice Chairman of the WPB, sent October 2, 1942 (Finding 39, R. 99):

"I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage."

- 10) Memorandum of Under Secretary of War and Under Secretary of Navy to Chairman of the WPB, sent October 5, 1942 (Finding 40, R. 100):

"There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on."

APPENDIX B

Priorities Regulation 13 and the two amendments of Order L-208.

The Government's contention that it was a purpose of L-208 "to divert mining machinery and equipment to essential wartime enterprises"¹ was not advanced in the Court of Claims or in the petition for certiorari, but was made for the first time in the Government's brief on the merits.²

In support of that contention the Government relied primarily on Priorities Regulation 13 and two amendments of Order L-208 which were adopted by the WPB on November 19, 1942 and August 31, 1943, respectively.

Priorities Regulation 13.

Priorities Regulation 13, which was issued by the WPB on July 7, 1942, 7 Fed. Reg. 5167, is not in the record.

The petitioner implied in its brief on the merits that Priorities Regulation 13 restricted sales of "material and equipment idled by L-208", but the respondents showed in Appendix A to their brief that that interpretation of the Regulation was erroneous (p. 60-62).

The Regulation is not mentioned in this Court's opinion and we assume that the Court did not accept the Government's contention relating to it.

The amendments of Order L-208 adopted on November 19, 1942 and August 31, 1943.

In its brief on the merits the Government also relied on the amendments of L-208 adopted on November 19, 1942 and August 31, 1943, which were intended to control any sales of mining equipment (including machinery) that the owners of the closed gold mines might wish to sell.

¹ Petitioner's brief, p. 2.

² Respondents' brief, p. 60-62.

Appendix B

While a memorandum summarizing the amendment of November 19, 1942 was introduced in the record below, the amendment was never mentioned in anything submitted to the hearing officer or to the Court below and was not referred to on the oral argument.³

The amendment of August 31, 1943 is not in the record and was not referred to in any way below before the Commissioner or the Court of Claims, either in writing or orally.

In the statement of the case in this Court's opinion, the two amendments were summarized briefly and the amendment of November 19, 1942 was quoted (p. 160-161). In the subsequent discussion, the Court said (p. 167):

"In any event, L-208 was soon amended to prohibit sale to nonessential users."

The Court did not indicate to what extent, if at all, it relied upon the amendments of L-208 as a support for the statements in the Court's opinion that when issuing L-208 "the WPB expected that L-208 would release substantial amounts of scarce mining equipment for use in essential industries" (p. 166), that "The WPB could properly rely on the profit motive to induce the mine owners to liquidate their inventories, and it was thought that the people who would be interested in purchasing used mining equipment probably would be the owners of essential mines" (p. 167), and that the WPB decided "that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended" (p. 168).

The reason for the issuance of the amendment of November 19, 1942 is to be found in the WPB memorandum accompanying the amendment (Defendant's Exhibit 3, R.

³ Respondents' brief, Appendix A, p. 62-63.

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478-479, 1574C, 1574D, 1575), which is the only evidence in the record relating to the amendment.

The memorandum accompanying the amendment did not say that the WPB expected that Order L-208 would release substantial amounts of scarce mining equipment. Nor did it say that the unrestricted use of such equipment in gold mines was wasteful of wartime resources. Nor did it say that the profit motive could be relied upon to induce the mine owners to liquidate their inventories. So far as is here pertinent the memorandum said only (R. 1575):

"Operators of closed gold mines may wish to sell critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines."

The quoted memorandum treated the closing of the mines as an accomplished fact and undertook only to deal routinely with a consequence of that fact. It contained no recommendation that the gold mine owners be compelled to transfer their equipment and no suggestion that the equipment was badly needed elsewhere. The memorandum and the amendment of November 19 related only to ma-

*The full text of the pertinent paragraph in Defendant's Exhibit 3 (R. 1575) is as follows:

"2. A provision freezing the machinery in nonessential mines. Operators of closed gold mines may wish to sell critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines. The proposed new paragraph freezes such machinery and equipment, but does not tie up small and standard operating supply items. Provision is made to have operators report promptly to the Mining Branch a description of all frozen machinery and equipment. The Mining Branch is setting up a unit to help in the speedy disposal of such machinery and equipment as the operator may wish to sell. The complete list will be available in case it becomes essential at a later date to requisition the other machinery and equipment."

Appendix B

chinery and equipment which the mine owners *might wish to sell*.

As we said in Appendix A to the respondents' brief on the merits in this Court (p. 65):

"The amendment of November 19 could not change the character of what was done on October 8. If there were a convincing showing that on October 8 the WPB issued Order L-208 with the intention of channelling machinery and equipment into the non-ferrous metals mines and inadvertently omitted the provision which was added on November 19, a different case might be presented. But that is not what happened.

"If there was a taking on October 8 through the issuance of Order L-208 for the purpose of maneuvering gold mine labor to the nonferrous metal mines, it certainly did not end on November 19 because of the issuance of the amendment, which merely undertook to deal routinely with one of the incidental consequences of the taking."

The Government did not attempt to explain the occasion for or effect of the amendment of August 31, 1943. This Court has interpreted it as permitting the "disposition of equipment, without approval of the WPB, to persons holding certain preference ratings" (Opinion, p. 161). If, as seems to us indisputable, the amendment of November 19, 1942 does not tend to establish that it was a purpose of Order L-208, as issued, to conserve mining equipment, the further amendment of the Order on August 31, 1943 certainly has no such tendency.

APPENDIX C**The WPB meeting of June 15, 1943.**

The earliest minute of a WPB meeting containing any reference to the diversion of mining equipment to essential industries is that of the meeting of June 15, 1943, at which the WPB decided not to rescind L-208 (Defendant's Exhibit 51, R. 965-966, 1605-1607).

The petitioner's brief contained a long quotation from the minute (p. 104-107) and it was discussed in the respondents' brief (Appendix A, p. 65-68).

The minute was offered as an Exhibit by the Government "to show the action taken by the Board and the discussion within the Board pertaining to the possible revocation of the order" (R. 966). Emphasizing the limitation on the offer, counsel for the Government said "That is the only purpose of the offer" (*id.*).

With respect to mining equipment, the minute set forth that (R. 1606):

"By closing the nonessential gold mines a great deal of equipment was made idle and became available for essential activities. It is estimated that by the middle of May 1943, 2,200,000 dollars of used gold mining equipment had been transferred to essential activities and transfers are continuing at the rate of about 100,000 dollars per week."

The estimate that \$2,200,000 of used gold mining equipment had been transferred to essential activities over a period of seven months can hardly have been very impressive. In any event, the recital of that estimate on June 15, 1943, eight months after the issuance of the Order, in a minute which related to a possible revocation of the Order and was offered in evidence only in that connection, does not afford any support for any of the statements in this Court's opinion that the WPB issued L-208 on October 8, 1942 because it expected that the Order would release

Appendix C

substantial amounts of scarce mining equipment for use in essential industries.

In the Court below there was no issue as to the reason why the WPB did not revoke the Order after it had once been issued. The Commissioner in the Court of Claims made no finding on that subject; the Government's 24 pages of Exceptions to the Commissioner's report (p. 350-373) contained no reference to the decision of the WPB on June 15, 1943 not to revoke the Order; and the Court of Claims made no Finding.

The WPB meeting of June 15, 1943 was not mentioned in this Court's opinion. Consequently, we assume that the minute of that meeting was not relied upon as supporting any of the statements in the Court's opinion as to the purpose of L-208. However, we have thought it suitable to refer to the minute in this petition for rehearing because of the emphasis in the petitioner's brief on the meeting of June 15, 1943 (p. 104-107) and the reference in the minute, quoted above, to mining equipment.

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JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 928 50 758

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

VS.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Lilly v. Commissioner, 343 U. S. 90	6,8,a-14
Los Angeles & Salt Lake Railroad Co, 18 B.T.A. 168 (1929)	8,9
Lucas v. Wofford, 49 Fed. (2d) 1027	8,9,10
McDonald v. Commissioner, 323 U. S. 57	6,7,a-12,a-13
Sunset Scavenger Company, Inc. v. Commissioner, 84 Fed. (2d) 583	10,a-12
Textile Mills Corp. v. Commissioner, 314 U. S. 326, 38 B.T.A. 623 (1938)	6,8,9,10,a-6,a-11,a-13,a-14,a15
Welch v. Helvering, 290 U. S. 213	7,a-11
Federal Statutes and Regulation:	
Internal Revenue Code of 1939, Sec. 23(a)(1)(A)	2,3,5,6,a-1,a-5,a-6,a-10,a-13,a-18
Internal Revenue Code of 1939, Sec. 23(q)	2,5,a-1,a-5,a-10,
Internal Revenue Code of 1939, Sec. 102	3
Internal Revenue Code of 1954, Sec. 162(a)	6
Internal Revenue Code of 1939, Sec. 1141(a)	7
Internal Revenue Code of 1954, Sec. 7482	7
Treas. Reg. 111, Sec. 29,23(q)-1	5,10,a-6,a-11,a-18
Pub. Law 773, 80th Congress, 2nd Session (1948), Sec. 36	7
State Statutes:	
Ark. Stats. Ann. of 1957, Sec. 48-801	a-2,a-21
Ark. Stats. Ann. of 1957, Sec. 48-807	a-2,a-20
Miscellaneous:	
Merten's Law of Federal Income Taxation, 1954, 32.3	10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. _____

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

F. Strauss & Son, Inc., of Arkansas, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above styled case on January 24, 1958.

OPINIONS BELOW

The opinion of The Tax Court of the United States, (Appendix A, pp. a-1 through a-7, *infra*) was reported at 28 T.C. 65. The opinion of the Court of Appeals, (Appendix B, pp. a-8 through a-15, *infra*) is reported at 251 Fed. (2d) 724.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, p. a-16, *infra*) was entered on January 24, 1958. A timely Petition for Rehearing was denied on the 3rd day of March, 1958, (Appendix D, pp. a-17). The jurisdiction of this Court is invoked under 28 U.S.C.A., paragraph 1254(1), and Sec. 7482, Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether payments by a corporate taxpayer to an organization established and utilized for the purpose of carrying on a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure, if passed, would have destroyed the taxpayer's business, are deductible as ordinary and necessary business expenses under Section 23(a)(1)(A), I.R.C. of 1939.

2. Whether a regulation forbidding deduction of expenditures for "... the promotion or defeat of legislation, the exploitation of propaganda" may properly be construed to bar deduction as a business expense of expenditures made to defeat an initiative measure submitted to the people at large, passage of which would have destroyed the business involved, and, if so construed, whether same is valid.

STATUTE, REGULATION, AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute, (Section 23(a)(1)(A), I.R.C. of 1939), and regulation (Section 29.23 (q)-1, Regulation 111), directly involved are set forth in Appendix E, pp. a-18 through a-19, *infra*. The state constitutional and statutory provisions incidentally involved are statutory provisions authorizing sale of liquor (Sections 48-305, 48-306 and 48-308, Ark.

Stats., 1947, Ann.) (Appendix E, pp. a-19—a-20); provisions relating to local option (Ark. Stats. 48-801 and 48-807) (Appendix E, pp. a-20—a-22); constitutional provisions relating to Initiative and Referendum (Appendix E, pp. a-22—a-24); and statutory provisions relating to non-profit corporations (Ark. Stats. 64-1301, 64-1302, 64-1306) (Appendix E, pp. a-24—a-25).

STATEMENT

Petitioner, an Arkansas corporation, had duly and timely filed a petition in the Tax Court of the United States requesting a redetermination of an asserted deficiency in income tax in the amount of \$20,990.36 for the calendar year 1950.

There were two issues originally involved; first, the disallowance of a deduction based on a payment in 1950 by petitioner in the amount of \$9,252.67 to Arkansas Legal Control Associates, Inc., either as a business expense on Sec. 23 (a)(1)(A) or as a contribution under Sec. 23(q), and secondly, whether petitioner was liable to the surtax imposed by Section 102 of the Internal Revenue Code of 1939 (Petition, R.3-4). The Section 102 issue was settled, leaving only the issue of disallowance of the claimed deduction, by stipulation that if Petitioner should prevail with respect to the issue still in controversy the Court should determine a deficiency of \$6,500.00, and if the Respondent should prevail the court should determine a deficiency of \$10,386.12 (Paragraph 10 of Stipulation, R. 17-18).

Most of the facts were stipulated (R.10-25) and were made a part of the findings of the Tax Court (R.27).

In 1950 Petitioner, an Arkansas corporation, was engaged in the wholesale liquor business (R.25; Findings, R.27, R.25). Subject to provisions for county-wide local

option (Sec. 48-801 and Sec. 48-807, Ark. Stats. Ann. of 1947) (Appendix E, pp. a-20—a-22), the sale of intoxicating liquor had been legal in Arkansas since 1935 (Findings, R.27). Pertinent provisions legalizing sale are found in Appendix E, pp. a-19—a-20.)

An initiated petition calling for an election on statewide prohibition was placed on the ballot and voted on in the General Election held in the State of Arkansas on November 7, 1950. The general purpose of the act, as the ballot title implied, was to make it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to, or transport the same within the State of Arkansas (Par. 4 of Stipulation, R.12) (Findings, R.27).

In May of 1950, nine liquor wholesalers, including petitioner, formed the Arkansas Legal Control Associates, Inc., as a non-profit organization pursuant to the provisions of state law (Findings, R.27) (R.12,25). The sole purpose of the wholesalers in forming this organization was to provide means of coordinating their efforts to persuade the general public, by advertising, to vote against the proposed prohibition act (Findings, R.27) (R. 25).

Between May and November, 1950, contributions totaling over \$126,000.00 were received by Arkansas Legal Control Associates, Inc., and during that period it paid out over \$100,000.00 for direct advertising through newspapers, radio, billboards and other media (Stip. R.13, 14, Ex. 5-E at R.19) (Findings, R.30). Such advertising contained reasons and statistics designed to convince the voters to defeat the act (Par. 7 of Stipulation, R.14,15,16, Exhibits 7-G and 11-K at R.21,22) (Findings, R.30). The Statewide Prohibition Act was in fact defeated (Par. 4 of Stip., R.13) (Findings, R.30).

cover of a regulation which, as here applied, is at variance with the governing statute.

These are important questions which should be settled by this Court. In answering these questions the court below, we submit, misapplied and misconstrued *McDonald v. Comm.*, 323 U.S. 57, and *Textile Mills v. Comm.*, 314 U.S. 326; particularly in the light of *Comm. v. Heininger*, 320 U.S. 467, and *Lilly v. Comm.*, 433 U.S. 90, and the recently decided cases of *Truck Tank Rentals, Inc. v. Comm.*, Oct. term 1957, No. 109, and *Comm. v. Neil Sullivan, et al*, No. 119, Oct. term, 1957, both decided by this Court Mar. 17, 1958, and appearing respectively at Vol. 2, Law Ed. (2d), pages 562 and 559.

These questions are basically the identical questions involved in *Cammarano v. United States*, (No. 718) (October term, 1957) now pending in this Court as a result of granting a Petition for Writ of Certiorari in that case (Vol. 2, L. Ed. 2d, p. 529, Mar. 17, 1958). That case involves the disallowance as a business expense of contributions by wholesale beer dealers to a fund established to defeat an initiative petition, which, if passed, would have placed retail beer exclusively in state owned stores; i.e., would have put wholesalers out of business. This case involves contributions to an organization formed to defeat an initiative measure, which, if passed, would have put liquor wholesalers out of business. In view of this, further argument amplifying the reasons relied on for granting the writ is here abbreviated:

I

These questions are important, and will continue to arise. Sec. 162(a) of the Internal Revenue Code of 1954* is the same as Sec. 23(a)(1)(A) of the 1939 Code.

* Sec. 162(a) provides in part:

"§ 162. Trade or business expense.

(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business. . . ."

The case was duly submitted on the pleadings, the Stipulation and Exhibits thereto, and oral testimony. The court determined that the contribution made by petitioner in 1950 to the Arkansas Legal Control Associates, Inc., was neither deductible as a business expense under Sec. 23(a)(1)(A) of the Internal Revenue Code of 1939, or as a contribution under Sec. 23(q) of the Internal Revenue Code of 1939 (R.26-32).

The court held for respondent primarily upon the ground that the regulation involved (Sec. 29.23 (q)-1, Regulations 111) was applicable and valid (Appendix A, pp. a-6—a-7).

From this decision the petitioner duly prosecuted a Petition for Review (R.32-36). In its brief before the Court of Appeals, petitioner abandoned any contention under Sec. 23(q), so that the only question for consideration by the Court of Appeals (and the only one considered, Appendix B, p. a-10) was the deductibility of the payment as a business expense under Sec. 23(a)(1)(A). The court below held (Appendix B, pp. a-11—a-15) that the regulation involved was applicable and valid, and further rested its decision on the ground that, quite apart from the regulation, the expenses were not ordinary and necessary (Appendix B, p. a-13).

A timely petition for rehearing was denied (Appendix D, p. a-17).

REASONS FOR GRANTING THE WRIT

The basic questions presented are whether legitimate expenditures made by a corporate taxpayer to convince voters to defeat an initiative measure, which, if passed, would have destroyed taxpayer's business, are, apart from regulations, ordinary and necessary business expenses, and, secondly, whether, if such expenses are otherwise ordinary and necessary, they can be disallowed under

The expenses here involved are clearly legal and legitimate, and were in the judgment of the taxpayer** absolutely necessary to prevent destruction. The case presents sharply the important questions of whether, first, legitimate expenses calculated to achieve an obviously desirable business result (i.e., non-destruction) do not possess all elements normally required for deductibility, any intimations of *McDonald* to the contrary notwithstanding, and, secondly, whether, if they do possess all elements usually required for deductibility, such expenses can be otherwise validly disallowed, merely because of a regulation directed to another type of activity.

II

The court below, we submit, misapplied *McDonald v. Comm.*, 323 U. S. 57. Although resting its opinion primarily on the regulation, the court held that the expenses were not allowable in any event. Logically, this is the first facet of the case to be discussed, for, if the expenses are not allowable irrespective of the regulation, obviously we need not discuss the question of the applicability or the validity of the regulation.

The court below relied in this connection (Appendix B, pp. a-12—a-13) upon *McDonald v. Comm.*, *supra*. That case we submit, is not applicable. Not only was that case bot-tomed (p.64) upon the now abrogated* rule of the Dobson case (*Dobson v. Comm.*, 320 U. S. 489) and to some extent, upon public policy (p.64) but that case primarily involved an attempt to convince voters to permit the taxpayer to engage in business in the future. We have here the ex-penses incurred to save an existing business from de-

*Sec. 1141 (a) of the 1939 Code, as amended by Sec. 36 of Pub. Law 773, 80th Congress, 2nd Session, effective Sept. 1., 1948, and its 1954 counterpart, Sec. 7482, both provide that Tax Court decisions are reviewable " in the same manner and extent as decisions in the district courts in civil actions tried without a jury."

**Cf. *Welch v. Helvering*, 290 U. S. 112, 113.

struction. This Court has allowed expenses of resisting a fraud order condemning a dentist's business; *Comm. v. Heininger*, 314 U. S. 326.** This principle was again accepted in *Lilly v. Comm.*, 343 U. S. 90, 94, in Note 4, where this Court noted with approval the statement in the Court of Appeals in the *Heininger* case (133 Fed. (2d) 567, 570) that . . . "Without this expense there would be no business. . . . To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary." See also *Lucas v. Wofford*, 49 Fed. (2d) 1027, allowing the expense of forestalling adverse legislation; also, *Los Angeles and Salt Lake Railroad Company*, 18 B.T.A. 168 (1929), allowing expenses of advertising in order to create favorable public opinion to forestall unfavorable legislation.

III

Primarily, the court below rested its decision on the regulation, in turn, relying on *Textile Mills*, *supra*, and the so-called re-enactment rule.

A. The opinion of the court below that *Textile Mills* sustained the regulation involved *without qualification* (Appendix B, p. a-14) seems completely unwarranted. *Textile Mills* involved expenses paid pursuant to a contract for procuring legislation. The lower court in *Textile Mills*, 117 Fed. (2) 62, pointed out that those contracts had been specifically held invalid in *Gesellschaft Fur Drahtlose Telegraphie M. B. H. v. Brown*, App. D. C. 357, 78 Fed. (2d) 410, and *Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H.*, 70 App. D. C. 94, 104 Fed. (2d) 227, certiorari denied 307 U. S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521. This Court recognized that the contracts were at least of dubious validity, and therefore, this Court would not say

**And if expenses of trying to convince a court that taxpayer should be permitted to stay in business are allowable, why not expenses of trying to convince the voters?

that in applying the Regulation to such a situation "the line was too strictly drawn", (p.339). That is a far cry from upholding the Regulation if and as applied to the instant situation, where no frown of public policy is present. In view of *Comm. v. Heininger*, 314 U.S. 326, and *Lilly v. Commissioner*, 343 U. S. 467, restricting denial of expenses otherwise allowable to those that frustrate sharply defined national and state policies, it is apparent that *Textile Mills* would not govern here. And *Tank Truck Rentals, Inc. v. Comm.* and *Comm. v. Sullivan*, both *supra*, decided by this Court on Mar. 17, have made even clearer that *Textile Mills* upheld the Regulation only as applied to situations of doubtful legality or morality.

B. The re-enactment rule relied on by the court below (Appendix B, pp. a-13—a-14) is neither persuasive nor applicable. First, there has never been any case authoritatively construing and upholding the regulation until *Textile Mills* was decided in 1941. There has been no real re-enactment since that time, the last re-enactment prior to the 1954 Code being in 1939. There being no re-enactment, the rule simply does not apply; *Helvering v. Hallock*, 309 U. S. 106, Footnote 7.

Further, if the re-enactment rule had any applicability it would tend to sustain petitioner's position, rather than defeat it. Between the time the first regulation was adopted in 1917 and the year 1939, there were over 12 substantial re-enactments. During this period there were many decisions generally allowing expenses connected with the promotion or defeat of legislation provided they were legitimate expenses and were otherwise ordinary and necessary. *Lucas v. Wofford*, *supra*, (1931) (expenses incurred to forestall adverse legislation); *Los Angeles and Salt Lake Railway Company*, *supra* (1929), advertising to avoid unfavorable legislation on return of the

railroads to private ownership after the War). The lower court, in *Textile Mills* itself, 38 B.T.A. 623 (1938) refused to be guided by *Sunset Scavenger Company, Inc. v. Commissioner*, 84 Fed. (2) 483, the primary contrary authority at the time, but referred approvingly to *Lucas v. Wofford*, *supra*, and held for the taxpayer.

At the best, there was no settled judicial construction of the regulation prior to 1939. The interpretation not being settled, there is no reason to apply the rule; *Merten's Law of Federal Income Taxation*, 1954, 32.3. And as pointed out, *Textile Mills* never applied the Regulation to the instant situation in any event.

"... We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, *supra*.

IV

As pointed out, the issues here are identical with those presented in *Cammarano v. U. S.*, Certiorari granted, 2 Law Ed. (2nd) 529. Both cases involve expenditures to defeat initiated measures which, if passed, would have destroyed the taxpayer's business. Although that case involved an individual and this case involves a corporate taxpayer, the portions of the Regulations applying to each type of taxpayer is the same.*

*The pertinent portion of Sec. 29.23(o)-1, Reg. 111, applying to individuals, provides: "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income." Identical language is contained in Sec. 29.23(q)-1, Appendix E, page a-18—a-19.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari be granted.

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Of Counsel

APPENDIX A

**(Findings of Fact and Opinion of The Tax Court
of the United States.)**

28 T. C. No. 65.

Tax Court Of The United States

F. Strauss & Son, Inc. Of Arkansas, Petitioner,

Docket No. 53669. vs.

Commissioner Of Internal Revenue, Respondent.

Filed May 31, 1957.

The petitioner, a wholesale liquor dealer, paid sums of money to a corporation organized by nine Arkansas liquor wholesalers for the purpose of persuading Arkansas voters by various advertising devices to vote against proposed Arkansas prohibition act.

Held: Such sums are not deductible either as business expenses under section 23(a)(1)(A), Internal Revenue Code of 1939, or as contributions under section 23(q), Internal Revenue Code of 1939.

E. Chas. Eichenbaum, Esq., for the petitioner.

John P. Higgins, Esq., for the respondent.

Bruce, Judge The respondent determined a deficiency in the income tax of petitioner for the calendar year 1950 in the amount of \$20,990.36. Of the adjustments made by respondent the only one remaining in dispute is whether payment of \$9,252.67 by petitioner to the Arkansas Legal Control Associates, Inc., in 1950 constituted an ordinary and necessary business expense of petitioner or, alternatively, whether such payment is deductible as a contribution within the meaning of section 23(q), Internal Revenue Code of 1939.

Findings Of Fact.

The stipulated facts, together with attached exhibits, are incorporated herein by this reference. Petitioner is a corporation organized under the laws of the State of Arkansas with its principal place of business in Little Rock, Arkansas. Petitioner kept its books and prepared its income and excess profits tax returns on an accrual basis of accounting. Its 1950 income and excess profits tax return was filed with the collector of internal revenue for the district of Arkansas. In the year 1950 petitioner was engaged in the whole-sale liquor business.

Subject to provisions for countywide local option (secs. 48-801 and 48-807, Ark. Stat. Ann. of 1947), the sale of intoxicating liquor in Arkansas has been legal since 1935.

An initiative petition calling for an election on a statewide prohibition act was circulated in Arkansas, filed with the Office of the Secretary of State, placed on the ballot, and voted on in the general election held in Arkansas on November 7, 1950. The general purpose of the act was to make it unlawful to manufacture, sell, barter, loan, or give away intoxicating liquors within the State of Arkansas or to export from, import to or transport the same within the State of Arkansas.

In May of 1950 nine liquor wholesalers petitioned the Circuit Court of Pulaski County, State of Arkansas, to declare Arkansas Legal Control Associates, Inc. (hereinafter referred to as Control Associates) duly incorporated as a nonprofit corporation pursuant to the provisions of the state law. The Circuit Court of Pulaski County issued a certificate of incorporation to Control Associates on May 3, 1950. The stated objects and purposes of Control Associates provided, inter alia:

Article II.

Objects And Purposes.

Section 1.

The objects and purposes for which this organization is formed and the powers and rights which it shall exercise and enjoy are: To foster and promote in every and any lawful manner the interests of persons, firms, associations, corporation and others engaged or interested directly or indirectly in the alcohol beverage industry, or in any branch thereof, or in any industry or business alike or incidental thereto.

Section 2.

In furtherance, but not in limitation, of the foregoing general purposes, it is expressly provided that the organization shall have the following powers:

.
b. To engage in educational and publicity campaigns and programs.

c. To support improved regulatory laws governing the sale and use of alcohol beverage, and to uphold the system of private enterprise in the manufacture, distribution and sale of alcohol beverage.

d. To provide honest opposition to the principles of prohibition, and its resulting evils.

e. To support related public relations programs.
.

Article V.

Uses.

The corporation shall not be used for business purposes or make any contribution or expenditure in connection with

any election at which Presidential or Vice Presidential electors or a Senator or Representative to Congress are to be voted for or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for the pecuniary gain or profit of its members, and no part of the net earnings of the corporation shall inure to the benefit of any member or private individual. The corporation may, however, support or oppose public laws or constitutional measures which its members and trustees deem against public interest and opposed to the purposes and objects of the corporation.

.

The purpose of the wholesalers in forming Control Associates was to provide means of coordination of their efforts in persuading the general public to vote against the proposed statewide prohibition act.

An application for exemption under section 101(7) of the Internal Revenue Code of 1939 was filed with the Commissioner of Internal Revenue on May 25, 1951, by Control Associates. This application for exemption was rejected by the Commissioner on October 11, 1951. The letter of rejection provided in part as follows:

.

Inasmuch as the evidence on file in this office shows that your sole function and activity consisted of engaging in activities designed to influence legislation, through the use of the radio, advertisements in newspapers and dissemination of literature, it is the opinion of this office that you are not entitled to exemption from Federal income tax as a business league under the provisions of section 101(7) of the Code, and that you are not an organization of the same general class as a chamber of commerce or board of trade within the meaning of Income Tax Regulations III, section

29.101(7)-1. You will accordingly be required to file Federal income tax returns on Form 1120.

Contributions made to you are not deductible by the donors in computing their taxable net income in the manner and to the extent provided by section 23(o) and (q) of the Code.

.

After the organization of Control Associates in 1950 petitioner paid the amount of \$9,252.67 to that organization. Contributions totaling \$126,265.84 were received by Control Associates for the period beginning May 30, 1950 and ending November 30, 1950. During that period over \$100,000 was paid out by Control Associates for direct advertising through newspapers, radio, billboards, distribution of book matches, bar banners, special folders, and press releases. Such advertising contained reasons and statistics designed to convince the voters that it was to the public interest to defeat the act. The balance of the contributions were paid out for related expenses of supervising and coordinating such advertising. The statewide prohibition act was defeated. On its income tax return for 1950 the petitioner deducted the \$9,252.67 in dispute from gross income as business expense. The respondent disallowed such deduction.

Opinion.

The principal issue in this case is whether amounts paid by petitioner, a wholesale liquor dealer, to a corporation organized by nine Arkansas liquor wholesalers for the purpose of persuading Arkansas voters by various advertising devices to vote against a proposed prohibition act, are deductible as ordinary and necessary business expenses within the meaning of section 23(a)(1)(A), Internal Revenue Code of 1939. It is clear that such payments are not deductible under section 23(q), Internal Revenue Code of

1939, and the petitioner does not seriously contend otherwise.

The question involved herein has been determined many times by this and other courts. In *Textile Mills Securities Corporation vs. Commissioner*, 314 U. S. 326, the Supreme Court determined that certain amounts expended to provide publicity and promote propaganda seeking to influence proposed legislation were not deductible as "ordinary and necessary" business expenses within the meaning of section 23(a) of the Revenue Act of 1928, the language of which is identical with the applicable language of section 23(a)(1)(A) of the Internal Revenue Code of 1939.

We have recently had occasion to determine the principles involved in the instant case in *Herbert Davis*, 26 T. C. 49. There the petitioner was one of three licensed liquor dealers in Clinton, Tennessee, all of whom were restricted to operating within a three-block area located approximately in the center of the Clinton business district. Petitioner made certain payments in 1950 for dues to an association of liquor dealers, the funds of which association were used in the main for propaganda purposes and for campaign expenses in conjunction with a 1950 liquor referendum, to influence voters to vote "wet". In that case we followed the rule of *Textile Mills* and held that the payments were not deductible as ordinary and necessary business expenses.

The law is well settled. In *Textile Mills Securities Corporation vs. Commissioner*, 314 U. S. 326 (1941), the Supreme Court, in a case involving donations made by a corporation, gave its approval to the substance of the regulations here involved when it sanctioned the then applicable provision of Regulation 74 containing precisely the same language presently included in Regulations 111, sections 29.23(o)-1 and 29.23(q)-1. The application of such princi-

ples to limit the deductibility of donations of individuals under section 23(o) by Regulations 111, section 29.23(o)-1, is equally valid. Textile Mills Securities Corporation, *supra*; Mary E. Bellingrath, 46 B.T.A. 89 (1942); Mrs. William P. Kyne, 35 B.T.A. 202 (1936).

[fol. 76] We have also held that the principles embodied in such regulations were applicable as well under section 23 (a). McClintock-Trunkey Co., 19 T. C. 297, 304 (Issue 2), reversed on another issue (C.A. 9, 1954) 217 F. 2d 329. See also American Hardware & Equipment Co. vs. Commissioner, (C.A. 4, 1953) 202 F. 2d 126, affirming a Memorandum Opinion of this Court.

See also Wm. T. Stover Co., 27 T.C. 434, and Revere Racing Association, Inc. vs. Scanlon, 232 F. 2d 816.

Petitioner recognizes the contrary effect of these cases. It is argued, however, that the rule of the Textile Mills case has been substantially narrowed by subsequent decisions of the Supreme Court, citing *Heininger vs. Commissioner*, 320 U. S. 467, and *Lilly vs. Commissioner*, 343 U. S. 90. The *Heininger* case involved the deductibility of lawyers' fees and other legal expenses incurred by the taxpayer in unsuccessfully contesting a Post Office fraud order. *Lilly* involved the deductibility of an optical company's payments to eye doctors, which payments amounted to one-third of the retail price of eyeglasses which were prescribed to patients by such eye doctors. Neither involved the question of the deductibility of expenditures used for lobbying purposes and are therefore distinguishable and do not come within the precedent of the Textile Mills case. See *Lilly vs. Commissioner*, *supra*, at page 95. Accordingly, we hold that the payments in issue are not deductible by the petitioners as an ordinary and necessary business expense.

Decision will be entered that there is a deficiency in the amount of \$10,386.12.

APPENDIX B

OPINION BELOW

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,864

**F. Strauss & Son, Inc.
of Arkansas,**

Petitioner,

**Commissioner of Internal Revenue,
Respondent.**

**Petition to Review
Decision of The
Tax Court of the
United States.**

[January 24, 1958.]

Leonard L. Scott and E. Charles Eichenbaum (W. S. Miller, Jr., was with them on the brief) for Petitioner.

David O. Walter, Attorney, Department of Justice (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, Attorney, Department of Justice, and Grant W. Wiprud, Attorney, Department of Justice, were with him on the brief) for Respondent.

**Before GARDNER, Chief Judge, and WOODROUGH and VOGEL,
Circuit Judges.**

GARDNER, Chief Judge.

This matter is before us on petition to review a decision of the Tax Court which determined a deficiency in peti-

tioner's income tax for the year 1950 in the amount of \$10,386.12.

Taxpayer is a corporation which at all times here pertinent was engaged in the wholesale liquor business in Little Rock, Arkansas. The sale of liquor in Arkansas has been legal since 1935, subject to state laws providing for county-wide option. At a general election held in November, 1950, there was submitted to vote, pursuant to the Arkansas law, an initiated measure in the nature of a state-wide prohibition act which by its terms would have made it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to or transport the same within the state.

In this situation taxpayer and eight other wholesale liquor dealers organized a corporation known in the record as the Arkansas Legal Control Associates, Inc., which we shall hereinafter refer to as the corporation. The purpose of the wholesalers in forming the corporation was to persuade the electorate to vote against the proposed prohibition act, and for the period from May 30 to November 30, 1950, the corporation received contributions totaling \$126,265.84 and disbursed over \$100,000 for direct advertising through newspapers, radio, billboards, book matches, bar banners, special folders and press releases. Such advertising contained arguments designed to convince the voters that it was in the public interest to defeat the proposed prohibition act. Taxpayer's contribution to the corporation amounted to \$9,252.67. On its income tax return for 1950 taxpayer deducted this amount from gross income as an ordinary and necessary business expense but the Commissioner disallowed this deduction.

In the Tax Court taxpayer contended that its payment to the corporation was deductible as a business expense.

or alternatively, as a contribution. The Tax Court determined that the payment made by taxpayer to the corporation was neither deductible as a contribution under Section 23(q) of the Internal Revenue Code of 1939 nor as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939. Taxpayer has now abandoned its contention that this payment to the corporation was a contribution deductible under Section 23(q) of the Internal Revenue Code of 1939, but adheres to its contention that its payment to the corporation was an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939, and that is the sole question presented for our determination.

Section 23(a)(1)(A) reads in part as follows:

“In computing net income there shall be allowed as deductions: * * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.”

The statute does not define nor determine what is or is not an “ordinary and necessary” business expense. Deductions are a matter of legislative grace and do not turn on general equitable considerations and the burden of clearly showing the right to the claimed deduction is on the taxpayer. *Deputy v. DuPont*, 308 U. S. 488; *New Colonial Co. v. Helvering*, 292 U. S. 435; *Omaha Nat. Bank v. Commission of Internal Rev.*, 8 Cir., 183 F. 899; *O'Malley v. Yost*, 8 Cir., 186 F.2d 603; *Wetterau Grocer Co. v. Commissioner of Internal Rev.*, 8 Cir., 179 F.2d 158; *Montana Power Company v. United States*, 3 Cir., 232 F.2d 541. In *New Colonial Co. v. Helvering*, *supra*, the rule is stated as follows:

“Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.”

In *Omaha Nat. Bank v. Commissioner of Internal Rev.*, *supra*, in referring to the rule to be followed in determining income tax deductions we said:

"In examining the taxpayer's argument we are required to be mindful of the rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer."

The statute allowing deductions for ordinary and necessary business expenses, as has been observed, does not define nor determine what is or is not an ordinary and necessary business expense. In this situation Section 29.23(q)-1, Treasury Regulation 111, was adopted definitely describing certain classes of expenditures as not allowable deductions under this statute. The regulation reads as follows:

"* * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income."

This regulation has been in effect for nearly forty years and is in the nature of a proclaimed policy. It was considered and sustained by the Supreme Court in *Textile Mills Corp. v. Comm'r.*, 314 U. S. 326. In that case the court disallowed as deductions expenditures for services rendered in an attempt to procure legislation authorizing payment of claims submitted by former enemy aliens. In the course of the opinion the court among other things said:

"The words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch v.*

Helvering, 290 U. S. 111; *Deputy v. duPont*, 308 U. S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist v. Child*, 21 Wall. 441; *Hazelton v. Sheckells*, 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn."

See also *McDonald v. Commissioner*, 323 U. S. 57; *Roberts Dairy Co. v. Commissioner of Internal Rev.*, 8 Cir., 195 F.2d 948; *Sunset Scavenger Co. v. Commissioner of Internal Rev.*, 9 Cir., 84 F.2d 453; *Cammarano v. United States*, 9 Cir., 246 F.2d 751; *Revere Racing Association v. Scanlon*, 1 Cir., 232 F.2d 816; *American Hardware & Eq. Co. v. Commissioner of Internal Rev.*, 4 Cir. 202 F.2d 126.

Taxpayer is a corporation organized for the purpose of conducting a wholesale liquor business. It cannot, we think, be reasonably contended that expenditure in conducting a campaign for the defeat of a proposed prohibition enactment was an ordinary and necessary expense of "carrying on" a wholesale liquor business. The corporation was empowered by its charter to conduct a wholesale

liquor business and it was not empowered by its charter or articles of incorporation to conduct political campaigns. In *McDonald v. Commissioner, supra*, petitioner made very substantial expenditures in his campaign to be re-elected a judge and he sought to deduct these expenditures as ordinary and necessary business expenses. In denying the right to make these deductions, the court among other things said:

"He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years."

In that case, as in the instant case, it was urged that the expenditure was necessary as his defeat in the election would ruin his business. Quite aside from the Treasury Regulation, we think it cannot be said that this statute, Section 23(a)(1)(A) of the Internal Revenue Code of 1939, is a clear provision for such allowance.

It is urged by taxpayer that the quoted regulation, if applicable, is invalid, and in this connection it is contended that as there has been no real re-enactment of the Internal Revenue Code since this regulation was approved by the Supreme Court in the *Textile Mills* case, *supra*, the question of its validity is still an open one and, hence, it is not entitled to the support of the principle that repeated Congressional re-enactment of the statutory provision to which a regulation pertains gives it the force and effect of law. The decision in the *Textile Mills* case was presumably well known to the Congress. The Congress has had many sessions since this decision was handed down and the regulation itself has been in effect for nearly forty years, and presumably that fact was also well known to the Congress. Nevertheless, the Congress has passed no act rejecting the construction given this statute by this

regulation. *United States v. Armature Rewinding Co.*, 8 Cir., 124 F.2d 589; 47 C.J.S. Internal Revenue, Section 70, p. 201. In *United States v. Armature Rewinding Co.*, *supra*, in referring to the fact that the Congress had passed no act rejecting the construction adopted by the Commissioner of Internal Revenue, we said:

"It has, however, become increasingly apparent that the purpose of a taxing act, the probable intent of Congress, the general statutory scheme of taxation set up, and the construction adopted by the Commissioner of Internal Revenue and not rejected by Congress must all be given appropriate effect in determining what meaning is to be accorded a word or a phrase in such an act."

The applicable rule is succinctly stated in 47 C. J. S. Internal Revenue, *supra*, as follows:

"A treasury department regulation construing and interpreting an internal revenue statute is deemed approved by congress where congress thereafter substantially reenacts the statute. *A similar inference of congressional approval of the regulation is made where a substantial period of time has elapsed since the promulgation of the regulation and congress has not acted with respect to the statute . . .*" (Italics supplied.)

Manifestly, under this regulation the deductions here claimed did not constitute ordinary and necessary business expenses.

Taxpayer contends that the doctrine of the *Textile Mills* case has been modified by the decisions of the Supreme Court in *Commissioner v. Heininger*, 320 U. S. 467, and *Lilly v. Commissioner*, 343 U. S. 90. The argument is plausible but not convincing. The *Textile Mills* case sustained without qualification the regulatory provision in question as valid. In *Commissioner v. Heininger* and *Lilly*

v. *Commissioner*, both *supra*, the decisions were not based upon the Treasury Regulations but the question was whether certain expenditures were non-deductible because contrary to public policy. The court held they were not contrary to public policy and, hence, deductible. We think these decisions detracted nothing from the teaching of the decision in the *Textile Mills* case.

We have considered all the other contentions urged by taxpayer but think them without merit. The decision of the Tax Court is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15864 September Term, 1957

Friday, January 24, 1958.

F. Strauss & Son, Inc., of Arkansas *Petitioner*

v.

Commissioner of Internal Revenue *Respondent*

**Petition to Review Decision of the Tax Court
of the United States**

This cause came on to be heard on the petition to review the decision of the Tax Court of the United States entered June 4, 1957, which determined a deficiency in petitioner's income tax for the year 1950 in the amount of \$10,386.12, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of said the Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the said petition to review in this cause be, and the same is hereby, dismissed.

January 24, 1958.

APPENDIX D

(Order denying Petition for Rehearing.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15864 September Term, 1957.

Monday, March 3, 1958.

**F. Strauss & Son, Inc.
of Arkansas**

v.

Petitioner

**Commissioner of Internal Revenue
Respondent**

**Petition to Review
Decision of The
Tax Court of the
United States**

**Petition for rehearing filed by the petitioner in this
cause having been considered by this Court, It is now
here Ordered that the same be, and it is hereby, denied.**

March 3, 1958.

APPENDIX E

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 provides in pertinent part as follows:

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or Business Expenses.

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

2. Section 29.23(q)-1, of Treasury Regulation 111, as it existed during 1950, provided as follows:

*"Contributions or gifts by corporations.—*A corporation may deduct from its gross income contributions or gifts to organizations described in section 23(q) (see section 29.22(b) (4)-1 for definition of 'political subdivision'). Where payment is made in a taxable year beginning prior to the first taxable year beginning after the date of the cessation of hostilities in the present war, as proclaimed by the President, the charitable deduction prescribed is allowable to corporations even though the gifts or contributions are used outside of the United States or its possessions. Such deductions shall, to the extent provided by that section, be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23(a), see section 29.23(a)-13. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising

other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

“The provisions of the last paragraph of section 29.23 (o)-1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner, and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporation under section 23(q).”

3. The primary provisions of the law permitting sale at wholesale of liquor are contained in Sections 48-305, 48-306 and 48-308, of Ark. Stats., 1947, Ann., copied in pertinent part, as follows:

“48-305. *Wholesaler's permit.*—Any person, other than a distiller, manufacturer or rectifier, may apply to the Commission of Revenues, for a permit to sell spirituous, vinous (except wines) or malt liquors at wholesale. Such application shall be in writing and shall set forth in detail such information concerning the applicant as the Commissioner may require; and shall be accompanied by a certified check, or cash, or postal money order for the amount required by this act for such permit. If the Commissioner shall deny the application he shall return the fee to the applicant and, if the Commissioner shall grant the application, he shall issue a permit in such form as shall be determined by the rules of the Commissioner of Revenues. Such permit shall contain a description of the premises permitted and in form and substance shall be a permit to the person therein specifically designated to sell spirituous, vinous or malt liquors for beverage purposes. . . .” “... (Acts 1935, No. 108, Art. 3, § 5, p. 258; Pope's Dig., § 14109.)”

"48-306. *Commissioner not to deny wholesale permit.*—Hereafter, when any person, firm or corporation applies to the Commissioner of Revenue for a permit to sell spirituous, vinous or malt liquors at wholesale and the application filed by such person, firm or corporation conforms to the regulations and the conditions promulgated by the Commissioner of Revenues pertaining to the qualifications essential for the obtaining of such a permit, the Commission of Revenues shall issue such person, firm or corporation a permit to sell at wholesale spirituous, vinous or malt liquors. The Commissioner of Revenues shall not have any authority to deny any such person, firm or corporation a permit to sell spirituous, vinous or malt liquors when such person, firm or corporation has the qualifications required of applicants for such permits. (Acts 1947, No. 429, § 1, p. 1064.)

"48-308. *Refusal to sell to holder of wholesale permit prohibited.*—Hereafter, no distillery doing business in the State of Arkansas, or having salesman or representatives in the State of Arkansas promoting the sale of such distillery's products, shall refuse to sell the products of such distillery to any person, firm or corporation having a permit from the Commissioner of Revenues to engage in the wholesale business of selling spirituous, vinous and malt liquors. . . ." (Acts 1947, No. 429, § 3, p. 1064.)

4. The primary provisions relating to local option were originally contained in Ark. Stats. 48-807, which reads in pertinent part as follows:

"48-807. *Local option under Act of 1935—Petition—Election.*—Upon application, by written petition, signed by a number of legal voters in any county, city, town, district or precinct (in Counties having two Judicial Districts, the Legal Voters in either District may petition for an election and said election can only affect the Judicial District where said election may be held) to be affected, equal to thirty-five per cent (35%) of the qualified voters, it shall be the duty

of the judge of the county court in which county at the next regular term thereof, after receiving said petitions, to make an order on his order book directing an election to be held in such county, city, town, district or precinct to be affected thereby, on some day named in said petition no earlier than sixty (60) days after said application is lodged with the judge of said Court, which order shall direct the sheriff, or other officer of said county, who may be appointed to hold said election, to open a poll at each and all of the voting places in such county, city, town, district, or precinct on said date, for the purpose of taking the sense of the legal voters of such county, city, town, district or precinct, who are qualified to vote at elections for county officers, upon the proposition whether or not spirituous, vinous or malt liquors, shall be sold, bartered or loaned therein. (Act 1935, No. 108, Art. 7, § 1, p. 258; Pope's Dig., § 14147.)"

This provision has been largely superseded by Section 48-801, which provides as follows:

"48-801. *Petition for election—Time for holding—Notice.*—When fifteen per cent (15%) of the qualified electors, as shown on the poll-tax records of the County shall petition the County Court of any County within this State, praying that an election be held in a designated County, Township, Municipality, Ward or Precinct, to determine whether or not license shall be granted for the Manufacture or Sale, or the Bartering, Loaning or Giving Away of intoxicating liquor within the designated territory, the County Court, within ten (10) days thereafter, (the County Court shall be open at all times for the purposes of this act) (§§ 48-801-48-806) shall give a public hearing to determine the sufficiency of the petition; and if it be found that fifteen per cent (15%) of the persons who have paid the poll-taxes for the year, making them qualified voters at the time the petition is filed, (or qualified electors in case the qualifications for electors should be changed by Constitutional Amendment) have signed said petition, said County Court

shall order a Special Election to be held in such County, Township, Municipality, Ward or Precinct, to be affected thereby, for the sole and only purpose of voting on the question presented by the petition. Such election shall be not earlier than twenty (20) days nor later than thirty (30) days after the rendition of the Court's decision at said public hearing. Public notice of the purpose and date of such election shall be given by the Sheriff of the County at least ten (10) days before the holding of such election, in accordance with the provisions of section 4672 of Pope's Digest of the Statutes of Arkansas (§ 3-804). (Init. Meas. 1942, No. 1, § 1, Acts 1943, p. 998.)"

5. Amendment No. 7 to the Constitution of Arkansas, approved in the General Election November 20, 1920, provides in pertinent part as follows:

"No. 7. Initiative and Referendum

Sec. 1. Legislative power.—The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill. . . ."

"State Wide Petitions

Initiative—The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a Constitutional Amendment by initiative petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for State-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing,

the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation. . . .”

“General Provisions

Definition—The word “measure” as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character.

No Veto—The veto power of the Governor or Mayor shall not extend to measures initiated by or referred to the people.

Amendment and Repeal—No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the City Council, as the case may be.

Election—All measures initiated by the people, whether for the State, county, city or town, shall be submitted only at the regular elections, either State, congressional or municipal, but referendum petitions may be referred to the people at special elections to be called by the proper official, and such special elections shall be called when fifteen per cent of the legal voters shall petition for such special election, and if the referendum is invoked as to any measure passed by a city or town council, such city or town council may order a special election.

Majority—Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such elections. Such measures shall be operative on and after the 30th day after the election at which it is approved, unless otherwise specified in the act. This section shall not be construed to deprive any member of the General Assembly of the right to intro-

duce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution. . . .”

“ . . . *Self-Executing*—This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people. . . .”

6. Pertinent provisions relating to non-profit corporations are hereafter noted.

ARK. STATS. 1947 ANN.

“64-1301. *Organizations included — Incorporation.*—Any lodge of Freemasons or Odd Fellows, divisions of Sons of Temperance, or any grange of the Patrons of Husbandry, or any co-operative or other association organized for benevolent purposes or for the mutual benefit of its members, or for the promotion of any other good and useful object, or any library company, school, college, medical, mechanical, agricultural or other association organized for the promotion of literature, education, science or art, or any association organized for the promotion of bodily or mental health, and all societies organized to promote either or all of the above named objects, and for all other similar purposes, by whatever name they may be known, consisting of not less than three (3) persons, and also any association of merchants and others in any incorporated city, organized not for pecuniary profit, but as a board of trade or chamber of commerce, or of any special branch thereof, in such city, consisting of not less than nine (9) persons, may be constituted and declared a body politic, and corporate, with all the privileges and powers, and subject to all the liabilities contained in this act (§§ 64-1301-64-1308). (Act Feb. 3, 1875, No. 51, § 1, p. 131; C. & M. Dig., § 1788; Pope’s Dig., § 2252.)”

“64-1302. Articles filed with clerk of circuit court and recorder.—Any association of persons desirous of becoming incorporated, under the provisions of this act (§§ 64-1301-64-1308), shall file with the Clerk of the Circuit Court and Recorder for the proper county a copy of their constitution or articles of association, and a list of all the members, together with a petition to said court for a certificate of incorporation under the provisions of this act. (Act Feb. 3, 1875, No. 51, § 2, p. 131; C. & M. Dig., § 1789; Pope’s Dig., § 2253.)”

“64-1306. Powers—Management—Right to sue and be sued.— . . . Such corporation and association shall have the capacity of suing and being sued and is authorized to do any and all things necessary, convenient, useful or incidental to the attainment of its purposes as fully and to the same extent as natural persons lawfully might or could do, as principals, agents, contractors, trustees or otherwise . . .”

SUPREME COURT. U. S.

NOV 14 1958

JAMES R. BROWNING, Clerk

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958**

No. 50

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit.**

REPLY BRIEF FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

No. 50

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

It is not the purpose of this Reply Brief to try to answer each and every facet of the Government's argument, for many of these contentions, we believe, will fall of their own weight. Indeed, it is not so much what the Government has said, as what it has failed to say, that we think should be called to this Court's attention, as additional evidence of the strength of our original position.

I

*Apart From the Regulation, the Expenses Were
Unquestionably Ordinary and Necessary*

It is significant that nowhere in its brief has Respondent denied our most fundamental assertion:—name-

ly, that apart from the regulation, the expenses of preserving a business from destruction were clearly ordinary and necessary. We do not here reiterate the argument shown at pages 9-13 of our main brief; but we do want to call to this Court's attention as strongly as we can, again and again, that the expenses were clearly allowable had there been no regulation. The Respondent should not be permitted by oblique attacks and the raising of side issues to obscure that basic consideration in this case. It, of course, goes without saying, that a regulation attempting to deny a deduction clearly allowable under the statutes, is, to that extent, invalid. *Bingham Trust Company v. Comm.*, 325 U.S. 365, 89 L. Ed. 1670; *Campbell Galeno Chemical Co.*, 281 U.S. 599, 74 L. Ed. 1063; *Miller v. U. S.*, 294 U.S. 435, 440, 79 L. Ed. 977; *Koshland v. Helvering*, 298 U.S. 446, 447, 80 L. Ed. 1268.

II

The Regulation, as Applied to this Case, is Bolstered Neither by Textile Mills nor the Re-Enactment Rule

(A) *Textile Mills is Limited to Expenses of Doubtful Legality*

Although this Court, in *Comm. v. Heininger*, 320 U.S. 467, at page 473, and *Lilly v. Comm.*, 343 U.S. 90, 95, referred to Textile Mills as involving some types of lobbying long condemned by it, although the Tax Court in its opinion below (R.32) distinguished *Heininger* and *Lilly* from Textile Mills on the ground that they did not involve "expenditures used for lobbying purposes", and although the language in the Textile Mills case seems to indicate that this Court itself regarded lobbying as involved, we may here assume, for the purpose of argument, that there existed in Textile Mills no lobbying in the strict sense. This is far from saying, however, that the possibility of lobbying and political pressure had nothing

to do with the case. Indeed, as we have indicated in our brief in main, it was the *tendency* of the very contract involved to cause the forbidden individual and personal influence and solicitation that was a principal cause of its illegality. The contract was void regardless of whether corruption was actually resorted to; its evil tendency was sufficient to vitiate it. *Hazelton v. Sheckells*, 202 U.S. 71, 79, 26 S. Ct. 567, 568, 50 L. Ed. 939, 6 Ann. Cas. 217; *Powers v. Skinner*, 32 Vt. 274, 80 Am. Dec. 677; *Marshall v. Baltimore & Ohio Railroad* (1853), 16 Haw. (U.S.) 314, 14 L. Ed. 953; 29 ALR 159, et seq.; see also 46 ALR 196. Some courts, including this Court (*Providence Tool Company v. Norris* (1865), 2 Wall. (U.S.) 45, 17 L. Ed. 868; *Crocker v. U. S.* (1916), 240 U.S. 74, 60 L. Ed. 533, 36 Sup. Ct. Rep. 245; *Trist v. Child* (1874), 21 Wall. 441, 22 L. Ed. 623), have placed a stronger emphasis on the contingency aspect of contracts to procure concessions, favors or legislation from the government or officials thereof than others, who do not consider that aspect alone fatal. 46 ALR 203, 29 ALR 166. Again, it is the tendency to cause corrupt action rather than existence or non-existence thereof that is emphasized.

But, as we tried to urge in our brief in main, it was not the actual but the probable illegality of the contract that was important. We are amazed to see Respondent even suggest (B.23) that this court had said in *Textile Mills* that whether the contract was contrary to public policy was "not material". We are reminded of an old sentence derived from childhood, which read: "Johnny said the teacher was a fool." Properly punctuated and emphasized, the sentence read: "Johnny," said the teacher, "is a fool." Similarly, when this Court said "whether the precise arrangement here in question would violate the rule of those cases is not material", it was not emphasizing the phrase, "not material"; it was em-

phasizing "the precise arrangement". And for Respondent to further say (B.23) that even if the contract was contrary to public policy, that such a conclusion is "without relevance" is to ignore not only this Court's own statement in *Textile Mills*, that there was no reason why the rule-making authority could not draw a line between legitimate business expenses and "... those arising from the family of contracts to which the law has given no sanction . . .", but to further ignore the fact that such is the very distinction recently drawn by this Court in *Tank Truck Rentals, Inc. v. Comm.*, 356 U.S. 30, 2 L. Ed. (2d) 562, 78 S. Ct. 507 (1958), where this Court characterized *Textile Mills* as upholding "the validity of an income tax regulation reflecting an administrative distinction 'between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction'" (emphasis furnished). And Respondent's argument as to why such conclusion is "without relevance" is even more interesting. He asserts, citing *Heininger*, that *mere illegality* is insufficient to disallow a deduction—with which we agree. But the entire basis of Respondent's argument in this case, reduced to its simplest form, is that the deduction in this case *was* properly disallowed *although completely legal*, merely because of the regulation (B.24).

(B) *The Re-Enactment Rule is Inapplicable*

It is also significant that the Respondent has nowhere answered our argument set forth in pages 24 through 32 of our brief in main. If he takes issue with our conclusion that in 1939 and immediately prior to *Textile Mills* the re-enactment rule, if anything, would sustain Petitioner's position, we are unable to find such an assertion on his part, and certainly he cites no cases that would lead to a contrary conclusion. What Respondent does is merely ignore our argument,

blithely asserting without foundation that the decisions are "numerous and authoritative" (p.26). But let us see what cases he does cite. *Old Mission Cement Company v. Comm.*, 69 Fed. (2d) 676, Aff'd. 293 U.S. 289, was decided in 1936, and it is distinguishable on two separate grounds. First, the expenses—expenses of approving a referendum for an increased gasoline tax levy to provide additional funds for road building—were considered to be too remotely related to the concrete business of taxpayer; and, secondly, the expense was itself admittedly characterized as involving "lobbying". *Sunset Scavenger Co. v. Comm.*, 84 Fed. (2d) 453, was decided in 1936, and even assuming it was otherwise in point, as we have pointed out in our main brief (p.28), it simply was not in accord with the majority rule at that time. *Revere Racing Ass'n v. Scanlon* (1956), 232 Fed. (2d) 816; *Davis v. Comm.* (1956), 26 T.C. 49; *Wm. T. Stover Co. v. Comm.* (1956), 27 T.C. 434, and *Mosby Hotel Co. v. Comm.* (Oct., 1954), 1957 T.C. Memo, para. 54288, were all decided not only after the year here involved, 1950, but even after the enactment of the 1954 Code. *Roberts Dairy Co. v. Comm.*, 195 Fed. (2d) 948, C.A. 8th (1952), decided after the year here involved, held the expenses involved were not deductible as a donation under Section 23(q)-2. *Textile Mills* was not relied on or even cited. *McClintock-Trunkey Co. v. Comm.*, 19 T.C. 297, and *American Hardware & Eq. Co. v. Comm.*, 202 Fed. (2d) 126, decided respectively in 1952 and 1953, like *Roberts Dairy*, were not only decided after the year involved, but such a short period prior to 1954 that, even assuming that legislation in 1954* could otherwise properly be deemed re-enactment with respect to 1950, the interpretation given by those

*Statutes, of course, must be prospectively applied unless the contrary intent is clear. *Hassett v. Welch*, 303 U.S. 303, 82 L. Ed. 858 (1938); *Brewster v. Gage*, 280 U.S. 327, 74 L. Ed. 457. Assuming re-enactment gives a regulation the "effect" of law, shall the already much criticized doctrine be extended to give it such effect retroactively?

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courts could hardly be regarded at that time as being "well settled" or "long continued".

This must be particularly true in view of the fact that since 1944 Congress had before it the decision of the Tax Court in *Luther Ely Smith*,** 3 T.C. 696 (1944), acquiesced in by the Commissioner, that the regulation did not apply to a constitutional amendment to be voted upon by the people, because such initiated action was not "legislation". It is difficult to see how Congress could have thought other initiated acts were in a different category.

Further, what effect did Heininger and Lilly have on *Textile Mills*? Was this "well settled" in 1954, particularly when this Court had not yet spoken?

In somewhat the same connection, how could Congress "reenact" a version of the Regulation different from that warranted by the exact holding of *Textile Mills*?

We have asserted that the thrust of *Textile Mills*—if it can be reconciled with *Heininger*—was limited to expenses illegal or against public policy. If that decision extends to all expenses of every kind of legitimate activity affecting influencing legislation of every kind, then there is an end to the matter. But if our assertion is correct, can it be said that Congress, by some mumbo-jumbo mixture of silent acquiescence and retroactive action has "re-enacted" a different meaning, and has thereby in some strange way removed from this Court the power to interpret its own decision?

***Mosby Hotel, infra*, decided October, 1954, relied on by Respondent (Footnote 19, Br. 44), as "vitiating" the "validity" of *Luther Ely Smith, infra*, did not even cite the *Smith* case. Further, we are talking about re-enactment. How Congress, even if it could affect 1950 by a 1954 enactment, could "re-enact" a case not even then decided, is hard to understand.

(c) *The Activities, Albeit Characterize as Propaganda, Are Still Legal and Proper*

The suggestion by the Government that what is involved here in any event is "propaganda" that stands on a different footing is without foundation. It would be strange if that which by hypothesis is legal and deductible, the Regulation prohibiting lobbying and expenses of influencing legislation to the contrary notwithstanding, becomes illegal and non-deductible when characterized as propaganda, particularly when the latter term may well have been inserted merely to list one of the methods of carrying out the preceding ones.

In any event, propaganda, as pointed out by Judge Learned Hand in the *Slee* case cited by Respondent (*Slee v. Comm.*, 42 Fed. (2d) 184), is merely a "polemical word used to decry the publicity of the other side". See also page 7 of the Amicus brief—is this "propaganda" or education? And it is not to be forgotten that Judge Simon in his opinion in *Seasongood v. Comm.*, 227 Fed. (2d) 907, cited by Respondent, recalled that propaganda has been characterized as the "technique of the 'Big Lie'", and that in his view the term, under the statute, connoted "... coloring or distortion of facts". No such coloring or distortion of facts appears in this record (R.14-16; joint exhibits 7-G and 9-I, No. 50). There is nothing in this record giving any indication of falsity or deception in any of the statements addressed to the electorate.

The test to be applied to this portion of the regulation if otherwise applicable is the same as applied by Textile Mills to that portion relating to expenses of lobbying or of influencing legislation. If the expenses are illegal or against public policy, then we assume, *arguendo* (cf. p. 7 of this brief and footnote thereto), the regula-

tion prohibiting deduction of such expenses is to that extent valid; if the expenses are not illegal or against public policy (or probably so), the regulation is invalid.

Tested by such rules, it is apparent that there is nothing illegal or probably illegal, even if these expenses should be characterized as "propaganda". Although there is no specific finding as such in No. 50, the District Court in No. 29 specifically found (R.29,47) that there was nothing corrupt about spending money for these purposes; that, to the contrary, it was a perfectly proper and laudable activity. The expenditures in No. 50 were certainly just as proper and laudable. As we have indicated, all factual assertions appear to be true and all arguments fairly made. No deception or discoloration is apparent, or suggested the Tax Court (R.30) specifically found that the advertising contained "reasons and statistics" (not, misrepresentations and false figures) "designed to convince the voters it was in the public interest to defeat the Act". The argument (B.52) that the interest of the liquor wholesalers remained "untraceable" is ridiculous in view of advertisements that six million dollars in revenue from taxes on alcoholic beverages would be lost, that the "brewing industry" was the Arkansas rice farmers' best customer (Ex. H-8, R.-15); that the "brewing industry" bought over three million dollars of rice annually, and that 12,000 jobs would be lost (Ex. 9-I, R.-16,23). Any argument of anonymity is scarcely borne out in light of the fact that some advertisements gave the names of hundreds of citizens supporting it (Joint Ex. H-8, R. 15, Joint Ex. 9-I, R.23 No. 50) and there is no indication that the advertisements involved were not also sponsored by others than petitioner's group. It is to be doubted that the public, in any event, ever felt that arguments against return of prohibition were exactly opposed by those in the liquor business in Arkansas.

We pause to turn to the contract in the Textile Mills case as a factor for comparison. There the evil tendency of the contract invalidated it and contaminated expenses thereunder. Here, even if there had been a contract with an independent agency to devise advertising to defeat the act, we hold it would have been illegal. The underlying basis for invalidating typical contracts to procure legislation, the tendency to cause the corrupting elements of personal influence and solicitation, would be necessarily absent from such a contract. In any event, there was no contract here, and the expenditures made were perfectly legal.

We must not forget the existence of *Comm. v. Heininger, supra*, and *Tank Truck Rentals, Inc. v. Comm.*, 356 U.S. 30, 2 L. Ed. (2d) 562, 78 S. Ct. 507 (1958). These cases make it clear that the frown of public policy is insufficient to deny deduction of expenses otherwise deductible. The allowance of the deductions must frustrate sharply defined national and state policies, which must be evidenced by some governmental declaration thereof. Both conditions must exist; the expenses must frustrate public policy, and there must be a governmental declaration thereof. At best,* the regulation in this case expresses the governmental declaration. The law as settled by this Court in *Truck Tank Rentals* and in *Textile Mills* itself, at least limits the application of that regulation to expenses against or at least probably against public policy. To the extent the regulation draws a line in an area of doubtful legality (although it is difficult to reconcile mere illegality as a basis

*We do not in any manner wish to be considered as conceding that the Commissioner, by regulation, can establish a "public policy", and then later pull himself up by his bootstraps and point to the regulation as the requisite "governmental declaration thereof". See pages 5 and 13 of the Amicus brief filed in this cause. The instant case would point up the required denial of such a rule, for the "policy" thereby established might go far beyond the sphere of illegality.

for disallowance of the deduction with Heininger), we assume at this point that such regulation is valid. "The general policy being clear, it is not for this Court to draw the line."

But at least the "general policy" must also be there. Certainly, not even the Respondent, we think, would contend that the regulation would be valid if, instead of reading as it did, it read "including trade advertising and all other types of advertising". And it should be remembered, in the same connection, that in a sense most trade advertising can be regarded as "propaganda". Is it thereby not to be allowed as a deduction? Assuming there is a power at all for the Commissioner to fix public policy, there must be a limit to which a regulation can represent a governmental declaration of public policy. We do not here attempt to define those limits. Certainly many questions of law are questions of degree. The bad fades into the good so imperceptibly that it is understandable that there should be no attempt to draw a line in cases of doubt. Sustaining a regulation, however, where the expense involved is of doubtful legality is no basis whatsoever for sustaining the regulation where the expense involved, as is true in this case, is clearly legal and not against public policy; and this is particularly true in view of the pronouncements of Heininger, Lilly and Tank Truck Rentals, all *supra*.

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References to Sections Governing Contributions Are Not Relevant

We are unable to perceive why it is "anomalous" (Respondent's B.31) to hold that an expense which is ordinary and necessary should not be allowed because the same expense is not allowable as a charitable contribution. If Congress intended to equate business expense with charita-

ble donations, there would be no need to have the separate sections at all.

Prior to 1936 corporations could take no deduction for charitable contributions unless such donations qualified as an ordinary and necessary business expense. However, beginning with the 1935 act, a corporation has been allowed deduction for charitable contributions, subject to a 5% limitation, and, since 1938, subject to a further limitation that no part of such contribution* in excess of the 5% limitation could be deducted as a business expense (Section 23(a)-1(B), IRC 1939). In cases of individuals, contributions have been permitted since 1917. It was not until the 1954 act that there was a limitation that no part of contributions by individuals in excess of the permissible limitations could be deducted as a business expense (Section 162(b), IRC, 1954) (for a resume of this history, see Merten's, Vol. 4, Chap. 25, p. 246). Both the 1939 Code and now the 1954 Code have specifically recognized that there are many contributions which happen to qualify also as business expenses — if such a simple proposition needs recognition. The pertinent provisions simply impose a limit on such deductions as business expenses. On the other hand, if the contribution is made to a non-qualifying organization, and otherwise qualifies as a business expense it may be deducted without limitation (Merten's, Vol. 5, Chap. 31, p. 41).

Congress has never said that if an expense is a business expense there is any limitation upon its deduction, except to say that if what is a business expense also qualifies as a charitable deduction, it is limited in deduction as a business expense by Sec. 23 (a)-1(B) (and

*If it is "in fact" a contribution, Sec. 29.23(a)-13, Reg. 111; cf. **McDonnell Aircraft Corp.**, 16 T.C. 189, 198. We do not need here engender unimportant controversy by considering to what extent situations may exist where business expenses are "in fact" contributions and subject to the limitation.

now, of course, by Sec. 162 (b) IRC (1954). *Wm. L. Stover Co.*, 27 T.C. 434, 442, and report of Committee on Ways and Means cited in footnote thereto.

The provisions prohibiting deduction as charitable contributions of donations to organizations substantially engaged in influencing legislation originated with the 1934 and 1935 acts, as pointed out by Respondent (Br.28, p.29). But these provisions have never been considered expressly or impliedly as limiting in any way deductions under Sec. 23(a). The truth of the matter is that it should be apparent to even the most casual observer that when Congress limited deductions of donations to organizations, no substantial part of the activities of which is carrying on propaganda or influencing legislation, it did so merely because it did not regard organizations which carried on such propaganda or attempted to influence legislation as religious, charitable, scientific or educational. It had no idea of thereby preserving the "equilibrium" of the tax structure (Respondent's Br. p. 36).

If Congress wanted to limit the deductability of business expenses by the restrictive phraseology of Sections 23(q) and (o), why did it not add such restrictions to 23(a)(1)(A) itself? The pertinence of such an inquiry is emphasized by the fact that Congress did enact Sec. 23(a)-1(B) in the 1939 Code, and Sec. 162 in the 1954 Code,—but nothing more.

CONCLUSION

For the reasons given, it is submitted that the judgment below should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

No. 50

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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IN THE
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Petitioner

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On Writ of Certiorari to the
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for the Eighth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of The Tax Court of the United States, (R.32-34) was reported at 28 T.C. 65. The opinion of the Court of Appeals, (R.38-44) is reported at 251 Fed. (2d) 724.

JURISDICTION

The judgment of the Court of Appeals (R.44-45) was entered on January 24, 1958. A timely Petition for Rehearing, filed February 13, 1958 (R.45), was denied on the 3rd day of March, 1958. Petition for writ of certiorari was granted May 26, 1958 (R.46). The jurisdiction of this

Court is invoked under 28 U.S.C.A., paragraph 1254 -(1), and Sec. 7482, Internal Revenue Code of 1954.

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

The statute (Section 23 (a) (1) (A), I.R.C. of 1939), and regulation (Section 29.23 (q)-1, Regulations 111), directly involved are set forth in Appendix pp. a-1 through a-2, *infra*.

Since state constitutional provisions are also incidentally involved, these have also been set forth in Appendix. These are constitutional provisions relating to Initiative and Referendum (Appendix pp. a-2—a-4).

QUESTIONS PRESENTED

1. Whether payments by a corporate taxpayer to an organization established and utilized for the purpose of carrying on a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure, if passed, would have destroyed the taxpayer's business, are deductible as ordinary and necessary business expenses under Section 23 (a) (1) (A), I.R.C. of 1939.

2. Whether a regulation forbidding deduction of expenditures for "... the promotion or defeat of legislation, the exploitation of propaganda" ... may properly be construed to bar deduction as a business expense of legitimate expenditures made to carry on a publicity program to defeat an initiative measure submitted to the people at large, passage of which would have destroyed the business involved, and, if so construed, whether same is valid.

STATEMENT OF THE CASE

Petitioner, an Arkansas corporation, had duly and timely filed a petition in The Tax Court of the United States requesting a redetermination of an asserted deficiency in income tax in the amount of \$20,990.36 for the calendar year 1950.

There were two issues originally involved; first, the disallowance of a deduction based on a payment in 1950 by petitioner in the amount of \$9,252.67 to Arkansas Legal Control Associates, Inc., either as a business expense under Sec. 23 (a) (1) (A) or as a contribution under Sec. 23 (q), and secondly, whether petitioner was liable to the surtax imposed by Section 102 of the Internal Revenue Code of 1939 (Petition, R.3-4). The Section 102 issue was settled, leaving only the issue of disallowance of the claimed deduction, by stipulation that if Petitioner should prevail with respect to the issue still in controversy the Court should determine a deficiency of \$6,500.00, and if the Respondent should prevail the court should determine a deficiency of \$10,386.12 (Paragraph 10 of Stipulation, R.17-18).

Most of the facts were stipulated (R.10-25) and were made a part of the findings of the Tax Court (R.27).

In 1950 Petitioner, an Arkansas corporation, was engaged in the wholesale liquor business (R.25; Findings, R.27). Subject to provisions for county-wide local option (Sec. 48-801 and Sec. 48-807, Ark. Stats. Ann. of 1947), the sale of intoxicating liquor had been legal in Arkansas since 1935, (Findings, R.27; see also R.25). (See also Sections 48-305, 48-306, and 48-308, Ark. Stats., 1947, Ann.)

An initiated petition calling for an election on state-wide prohibition was placed on the ballot and voted on

in the General Election held in the State of Arkansas on November 7, 1950. The general purpose of the act, as the ballot title implied, was to make it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to, or transport the same within the State of Arkansas (Par. 4 of Stipulation, R.12) (Findings, R.27). Passage of the act would thus have necessarily put Petitioner out of business (R.25).

In May of 1950, nine liquor wholesalers, including petitioner, formed the Arkansas Legal Control Associates, Inc., as a non-profit organization pursuant to the provisions of state law (Findings, R.27) (R.12,25). The sole purpose of the wholesalers in forming this organization was to provide means of coordinating their efforts to persuade the general public, by advertising, to vote against the proposed prohibition act (Findings, R.27) (R.25).

Between May and November, 1950, contributions totaling over \$126,000.00 were received by Arkansas Legal Control Associates, Inc., and during that period it paid out over \$100,000.00 for direct advertising through newspapers, radio, billboards and other media (Stip. R.13, 14, Ex. 5-E at R.19) (Findings, R.30). Such advertising contained reasons and statistics designed to convince the voters to defeat the act (Par. 7 of Stipulation, R. 14,15,16, Exhibits 7-G and 11-K at R.21,22) (Findings, R.30). The Statewide Prohibition Act was in fact defeated (Par. 4 of Stip., R.13) (Findings, R.30).

The case was duly submitted on the pleadings, the Stipulation and Exhibits thereto, and oral testimony. The court determined that the contribution made by petitioner in 1950 to the Arkansas Legal Control Associates, Inc., was neither deductible as a business expense under Sec.

23 (a) (1) (A) of the Internal Revenue Code of 1939, or as a contribution under Sec. 23 (q) of the Internal Revenue Code of 1939 (R.26-32).

The court held for respondent primarily upon the ground that the regulation involved (Sec. 29.23 (q)-1, Regulations 111) was applicable and valid (R.30-32).

From this decision the petitioner duly prosecuted a Petition for Review (R.32-36). In its brief before the Court of Appeals, petitioner abandoned any contention under Sec. 23 (q), so that the only question for consideration by the Court of Appeals (and the only one considered, R.39) was the deductibility of the payment as a business expense under Sec. 23 (a) (1) (A). The court below held (R.40-44) that the regulation involved was applicable and valid, and further rested its decision on the ground that, quite apart from the regulation, the expenses were not ordinary and necessary (R.42).

SUMMARY OF ARGUMENT

I. *The expenses were ordinary and necessary.*

Apart from the Regulation, the expenses meet all tests of deductibility.

Expenses of attempting to defeat the imposition of Prohibition are hardly unusual in the life of a liquor business. They were therefore clearly "ordinary". *Welch v. Helvering*, 290 U.S. 111, 114, 78 L. Ed. 212, 214, 54 S. Ct. 8 (1933); *Deputy v. Dupont*, 308 U.S. 486, 495, 84 L. Ed. 416, 6 S. Ct. 96, (1940); *Comm. v. Heininger*, 320 U.S. 467, 471, 88 L. Ed. 171, 64 S. Ct. 249 (1943).

Similarly, the expenditures made were clearly appropriate and helpful. They were, therefore, "necessary". *Welch v. Helvering*, *supra*. *Comm. v. Heininger*, *supra*.

McDonald v. Comm., 323 U.S. 57, 89 L. Ed. 68, 65 S. Ct. 96 (1944) is not to the contrary. That case involved the attempted deduction of expenses to achieve ownership of a business which the taxpayer did not own, and to which he had no claim. The instant case involved the attempt preserve the income of a presently existing business owned by the taxpayer. The expenses were therefore deductible as a necessary means of defense against attack. *Comm. v. Heininger, supra*, *Lilly v. Comm.*, 340 U.S. 90, 96 L. Ed. 769, 72 S. Ct. 497 (1951), *Kornhauser v. U. S.*, 276 U.S. 145, 72 L. Ed. 505, 58 S. Ct. 219.

II. *No public policy or illegality prevents the deduction.*

Expenses otherwise deductible may not be disallowed for reasons of public policy unless an allowance of the deduction frustrates sharply defined national or state policies proscribing particular types of conduct evidenced by some governmental declaration thereof. *Tank Truck Rentals, Inc. v. Comm.*, 356 U.S. 30, 2 L. Ed. (2d) 562, 78 S. Ct. 507 (1958); *Comm. v. Heininger, supra*.

It is self-evident that public policy here encourages the expenditures. The First Amendment to the Constitution of the United States and Amendment #7 to the Constitution of the State of Arkansas, providing for the initiative and referendum, additionally underline such encouragement.

III (a). *The regulation is not applicable.*

Words in revenue acts should be interpreted in their normal, everyday meaning. *Crane v. Comm.*, 331 U.S. 1, 6; 91 L. Ed. 1301, 1306 (1946); *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 249, 85 L. Ed. 1310, 1311. The word "legislation" normally does not contemplate action by the people themselves. *Luther Ely*

Smith, 3 T.C. 696, 702 (1944); Webster's New International Dictionary of the English Language, Second Edition, 1945, page 1412.

In any event, the regulation should be interpreted to apply only to improper, illegal or immoral efforts to influence legislation. *Lucas v. Wofford*, *infra*, Los Angeles & Salt Lake Railroad Company, *infra*; *Textile Mills Corp. v. Comm.*, *infra*.

The construction suggested avoids any contention that the regulation is invalid as an improper interpretation of the statute, and should be favored. *Newman v. Comm.*, 76 Fed. (2d) 449, 452 (C.C.A. 5th). A contrary construction further may well violate the First Amendment to the Constitution of the United States as, in effect, a penalty for engaging in the right of free speech and petition; *Speiser v. Randall*, 78 S. Ct. 1332, 1338, June 30, 1958.

The regulation should be construed to avoid such grave constitutional doubt. *U. S. v. Rumely*, 345 U.S. 41, 47, 97 L. Ed. 770 (1953); *U. S. v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 408, 53 L. Ed. 836, 29 S. Ct. 527; *U. S. v. C.I.O.*, 335 U.S. 106, 120, 121, 92 L. Ed. 1849, 1860, 1861, 68 S. Ct. 1349.

III (b) *The regulation involved as applied to these facts is invalid.*

It has been demonstrated that the expenses are, apart from the regulation, clearly deductible. Therefore, for the regulation to attempt to deny the deduction under these particular circumstances is a misapplication and a misconstruction of the statute. It is, therefore, to that extent, invalid. *Bingham Trust Company v. Comm.*, 325 U.S. 365, 377, 89 L. Ed. 1670; *M. E. Blatt Co. v. U. S.*, 305 U.S. 267, 279, 83 L. Ed. 167, 172.

Textile Mills Corp. v. Comm., 314 U.S. 326, 86 L. Ed. 249 (1941), is not to the contrary. It upheld the validity of the regulation only as applied to situations of doubtful legality or morality, specifically as applied to expenses made pursuant to a contingent fee contract to procure legislation. Such contract was clearly illegal. *Gesellschaft Fur Drahtlose Telegraphie M.B.H. v. Brown*, 64 App. D. C. 357, 78 Fed. (2d) 410; *Brown v. Gesellschaft Fur Drahtlose Telegraphie M.B.H.*, 70 App. D. C. 94, 104 Fed. (2d) 227, certiorari denied 307 U.S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521; *Crocker v. U. S.*, 240 U.S. 74, 79, 60 L. Ed. 533, 537; *Hazelton v. Sheckells*, 202 U.S. 71, 79, 50 L. Ed. 939, 941.

Without determining whether the contract was invalid or not, but noting it was of dubious validity, this Court upheld the regulation as applied to such situations of doubtful legality only. It went no further.

The so-called "Re-enactment Rule" does not support the regulation.

That rule only applies when the interpretation is well settled and long continued. *McGaughan v. Hershey Chocolate Co.*, 283 U.S. 488, 492, 75 L. Ed. 1183; *U. S. v. Dakota-Montana Oil Co.*, 288 U.S. 459, 466, 77 L. Ed. 893, 897; *Helvering v. Winmill*, 305 U.S. 79, 83, 83 L. Ed. 53. The last re-enactment prior to 1950, the year in question, was 1939. Up to that time the courts generally approved expenses of influencing legislation, if done in a legitimate and ethical manner. *Lucas v. Wofford*, 49 Fed. (2d) 1027 (5th Cir., 1931); *Los Angeles & Salt Lake Railroad Company*, 18 B.T.A. 168 (1929); *Texas & Pacific Railway Co. v. United States*, 52 Fed. (2d) 1040 (Court of Claims, 1931), affirmed on other issues, 286 U.S. 295 (1932); *Sunset Scavenger Company, Inc. v. Comm.*, 84 Fed. (2d) 453 (1936), *contra*. At best, the construction of the statute

was not settled by 1939, and it has not been re-enacted since.

Assuming the doctrine of re-enactment can be extended to an acquiescence by long silence, even so, all that has been re-enacted has been the holding of *Textile Mills* as qualified by Luther Ely Smith, *supra*. Indeed, apart from Luther Ely Smith, *Textile Mills* applied the regulation only to items of doubtful legality or morality. Congress could not by silent acquiescence re-enact any different meaning.

ARGUMENT

I

THE EXPENSES INVOLVED WERE, FACTUALLY, ORDINARY AND NECESSARY

The real issue for decision in this case—the applicability and validity of the regulation involved—is both intensified and simplified by first considering this case without it.

Apart from the regulation, we submit, there is no question but that the expenses here involved were both ordinary and necessary.

“Whether an expenditure is directly related to a business and whether it is ordinary and necessary are doubtlessly pure questions of fact in most circumstances”; *Comm. v. Heininger, infra*.

Here we have expenditures made for the purpose—and the sole purpose, at that—of avoiding destruction of an existing business.

It is difficult to conceive that such expense was not “ordinary”, as the term is employed in the statute. Certainly what was done was not an unusual occurrence in the life of the business group or the community of which

this taxpayer was a part; *Welch v. Helvering*, 290 U.S. 111, 114, 78 L. Ed. 212, 214, 54 S. Ct. 8; (1933); *Deputy v. Dupont*, 308 U.S. 486, 495, 84 L. Ed. 416, 6 S. Ct. 96, (1940). Indeed, what this taxpayer did was merely a "common and accepted means of defense against attack"; *Welch v. Helvering*, p. 114, *supra*. It was the "response ordinarily to be expected"; *Comm. v. Heininger*, 320 U.S. 467, 471, 88 L. Ed. 171, 64 S. Ct. 249 (1943).

It is even more difficult to conceive that this expense was not "necessary" in the accepted meaning of that word. What was done was clearly, in the judgment of the taxpayer, (at the least) "appropriate and helpful, and therefore necessary"; it was an attempt to accomplish something beneficial to taxpayer's business; *Comm. v. Heininger*, *supra*, page 471, *Welch v. Helvering*, *supra*; see also *Comm. v. Pacific Mills*, 207 Fed. (2) 177, 180.

The Treasury has recognized the test as a practical one. For example, in its Regulations the Treasury indicates that contributions "which bear a direct relationship to the corporation's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation" are deductible business expenses (Regulation 111, Sec. 29.23 (a)-13).

From these Regulations and from *Welch v. Helvering* we learn that it is not essential for a finding of "necessity" that the expenditure be actually appropriate or helpful; it is sufficient that it is reasonably expected to prove so. The judgment of the taxpayer in this connection will not be lightly overturned. *Welch v. Helvering*, *supra*, page 113.

But here we have no fine questions of whether the taxpayer was incurring expenditures which were, from a factual viewpoint, reasonably necessary to his business. These expenses, from the taxpayer's viewpoint, were vital to this taxpayer's very existence. So far as this peti-

tioner was concerned, the initiated act before the people was a smoldering ember, which, in the absence of preventative measures, would have become a conflagration destined surely to destroy petitioner's business. Particularly appropriate here is the quotation from *Heininger v. Comm.*, 133 Fed. (2d) 567, 570, noted with approval by this Court in the Lilly case, *infra*:

"... Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary."

The court below, relying on *McDonald v. Comm.*, 323 U.S. 57, 89 L. Ed. 68, 65 S. Ct. 96 (1944) felt nevertheless that the expenses here were not necessary for the "carrying on" of this petitioner's business; that petitioner was empowered to conduct a liquor business, not to conduct political campaigns.

We suggest the argument goes too far. It is not what was done but its relationship to petitioner's business that counts. Petitioner here was not organized to advertise or carry on a trucking business any more than it was to make campaign contributions. Yet none would deny the deductibility of its ordinary advertising and delivery expense so long as they related to its business. Indeed, presumptively at least, every action of this corporate taxpayer not clearly *ultra vires* was done for a business purpose.

We note at the outset that the McDonald case was ultimately rested upon the now abrogated* rule of the

*Sec. 1141 (a) of the 1939 Code, as amended by Sec. 36 of Pub. Law 773, 80th Congress, 2nd Session, effective Sept. 1, 1948, and its 1954 counterpart, Sec. 7482, both provide that Tax Court decisions are reviewable, "... in the same manner and extent as decisions in the district courts in civil actions tried without a jury."

Dobson case (*Dobson v. Comm.*, 320 U.S. 489), and, to some extent, upon public policy, page 64; see also page 69.

The McDonald case was applicable to a particular situation and should be so confined. In that case the issue involved the right of a candidate to deduct party assessments and campaign expenditures. We suggest that in the word "candidate" lies the key to the distinction. Whether McDonald was a candidate for election or reelection, he was a candidate only; he had no rights of ownership, of income or otherwise in the future term of office which he sought. His rights related solely to the office which he was then holding for a specific period. He sought neither to defend *that* term of office nor preserve it. *Whether he won or lost, his rights to income from that particular office were and would remain unaffected by his expenditures.* Consequently, the expenses claimed, as this Court appropriately pointed out, were not expenses related to the conduct of or carrying on of that business. If such expenditures related, directly or indirectly, to income, they were related to the procurement of income from a business or office to be achieved *in futuro*. McDonald expended sums for the purpose of endeavoring to achieve an income or business status for future years, and to which he had no claim of right. The corporate taxpayer here, however, had both present and long-standing rights of ownership in an existing business and the income therefrom. The expenditures it made could well have affected—and vitally—the present flow of that income. Not only was the action of this taxpayer "ordinary" and "necessary", its action represented the most basic tenet of nature—the law of self-preservation. But McDonald preserved nothing. Indeed, he owned nothing to preserve, unless it was the balance of his then existing term; and that, as we have pointed out, could not be affected by his action. McDon-

ald's situation would be more akin to that of petitioner's if legislation had been proposed to abolish the judicial office to which he had already been appointed, or if he had been impeached. Failing that, he, like any other political aspirant, was a mere candidate for a business he had not yet achieved.

This Court has allowed expenses of resisting a fraud order condemning a dentist's business; *Comm. v. Heininger, supra*. If expenses of trying to convince a court that taxpayer should be permitted to stay in business are allowable, why not expenses of trying to convince the voters? Cf. also *Lilly v. Comm.*, 340 U.S. 90, 96 L. Ed. 769, 72 S. Ct. 497, (1951), where this court allowed expenses of "kickbacks"—expenses without which the business could not continue in existence. What can be more fundamentally related to the carrying on of a business than an involuntary defense against attack? The case at bar represents that basic defense against attack, a defense nonetheless imperative or necessary because the attack is by legislation rather than by suit. Cf. *Kornhauser v. U. S.*, 276 U.S. 145, 72 L. Ed. 505, 58 S. Ct. 219.

To hold that amounts expended to prevent potential destruction of this petitioner's business were not ordinary and necessary is to ignore "the ways of conduct and forms of speech prevailing in the business world"; *Comm. v. Heininger, supra*, page 472.

II

NO PUBLIC POLICY OR ILLEGALITY PREVENTS THE DEDUCTION

This Court has now made quite clear that expenses otherwise deductible may not be disallowed for reasons of public policy unless the allowance of the deduction frustrates sharply defined national or state policies

proscribing particular types of conduct evidenced by some governmental declaration thereof. *Comm. v. Heininger, supra*; *Lilly v. Comm., supra*; *Tank Truck Rentals, Inc. v. Comm.*, 356 U.S. 30, 2 L. Ed. (2d) 562, 78 S. Ct. 507 (1958).

That the expenses here involved were not illegal or immoral or against public policy—the expenses for an open appeal to the voters—is too obvious, we think, to require extended discussion. Indeed, the very fact that the State of Arkansas has, by Amendment Seven to its Constitution (Appendix a-3), reserved powers of lawmaking to the people through the initiative and referendum clearly contemplates that there must be expenses of presentation of the views of the antagonistic forces. And if the First Amendment to the Constitution of the United States does not—as indicated hereinafter—strike down the regulation involved, it certainly gives a strong undercurrent of approval to expenses of this kind.* “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . .” *Thornhill v. Alabama*, 310 U.S. 88, 101, 84 L. Ed. 1093, (1940). If there is any public policy involved here, state or federal, it is clearly a policy which would or should

*This court may also judicially notice the established practice on the part of congressional committees of soliciting public testimony, both by general announcement and by invitations to interested individuals. Cf. Press release of House Ways and Means Committee announcing public hearings on June 16, 1953, et seq., relating to tax revision, published New York Times, May 14, 1953, sec. 1, page 1, column 2. The importance to Congress of providing for public participation in legislative processes finds statutory recognition in provisions such as 2 U.S.C. § 190 (b), authorizing and regulating hearings before Senate standing committees, and 2 U.S.C. § 192, prohibiting refusal by a witness to testify or to produce papers. These provisions reflect a national policy of ensuring the adequate presentation and dissemination of private views respecting matters of public concern. The Federal Regulation of Lobbying Act, 60 Stat. 839 (1946), 2 U.S.C. §§ 261-270 (1952), further implements this policy by permitting proper “lobbying”.

encourage the necessary publicity here involved. Not only is no public policy, state or national, not frustrated here; disallowance of the deduction frustrates the public policies evidenced by the First Amendment to the Constitution of the United States and the Seventh Amendment to the Constitution of the State of Arkansas.

Thus far, in our discussion, therefore, we have expenses which are ordinary and necessary in the accepted sense of the word, and which are violative of no public policy, evidenced by governmental declaration or otherwise.

This points up the basic question in this case: May the Government, by ambiguous regulation—however long continued—disallow expenditures clearly allowable under the statute without it?

In consideration of this question, it should be remembered that the broad, fundamental purpose of our income tax laws is to tax “net, not ... gross income”, *McDonald v. Comm.*, *supra*. The purpose is “to tax earnings and profits less expenses and losses”; *Higgins v. Smith*, 308 U.S. 473, 477; 84 L. Ed. 406, 410; 60 S. Ct. 355 (1940).

III

THE REGULATION IS NEITHER APPLICABLE NOR VALID IF AND AS APPLIED TO THESE FACTS

(A) *The Regulation does not apply.*

If one does not end with the words used in the regulation, “one certainly begins there”; *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349; 85 L. Ed. 881 (1941).

Lobbying has been construed to be limited to representations made directly to Congress, its members or

committees, *U. S. v. Rumely*, 345 U.S. 41, 47, 97 L. Ed. 770 (1953), as contrasted to statements directed to the public at large attempting to influence by publicity the thinking of the community; see also *U. S. v. Harris*, 347 U.S. 612, 625, 98 L. Ed. 989. It is true this construction was made in order to avoid constitutional issues, but certainly this is, as this Court intimated, its normal meaning, in any event. Further, as pointed out more specifically hereafter, there are equally grave constitutional issues present here.

Likewise, the phrase "legislation" *ordinarily* refers to statutory enactments by representatives of the people, as contrasted to lawmaking by the people themselves. The definition of legislation in Webster's New International Dictionary of the English Language, 2nd Edition, 1945, p. 1412 states:

"... Jurisprudence, the making of laws by express decree or enactment, either by the supreme lawmaking power, as a king, council, legislature, etc., or by any person or body exercising the lawmaking power by delegation or in sub-ordination, as judges, committees, town or city councils, health boards, various executive officials, etc. Also, the laws that are so enacted."

The regulation involved, strictly speaking, simply does not cover the activity involved, there being no "legislation". As in *Luther Ely Smith*, 3 T.C. 696, 702 (1944), (involving an amendment to the Constitution by initiative petition), the association here involved "... engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the Constitution proposed by the initiative of the people. ..."

Although it is true that the word "legislation" can be interpreted to include the initiative and referendum,

that is not its meaning in normal parlance—and Revenue Acts should be interpreted in their “ordinary, everyday senses”; *Crane v. Comm.*, 331 U.S. 1, 6; 91 L. Ed. 1301, 1306, (1946); *Deputy v. Dupont*, *supra*, page 498; *McGaughan v. Hershey Chocolate Co.*, *infra*; *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 249, 85 L. Ed. 1310, 1310. Even if it can be said initiated or referred acts properly fall within the term “legislation”, the “promotion” and “defeat” of legislation referred to in the regulation should be construed to refer to promotion or defeat of legislation by procedures of doubtful legal, moral or ethical standing. Cf. *Los Angeles and Salt Lake Railroad*, *infra*. As pointed out in *Jerry Rossman Corporation*, 175 Fed. (2d) 711, “. . . there are ‘penalties’ and ‘penalties’, and . . . some are deductible and some are not,” so, here, there should be ‘expenses of influencing legislation’ and ‘expenses of influencing legislation’. This was the position almost uniformly followed prior to *Textile Mills*, *infra* (see pages 25 to 29 of this brief), and was, as is argued more in detail hereafter, the true meaning of that case itself.

We have argued hereafter that a contrary interpretation would be invalid as inconsistent with the Statute. The construction suggested avoids such a contention and so should be favored; *Newman v. Comm.*, *infra*.

Further, grave constitutional issues would arise from a construction that a tax deduction, otherwise allowable, may be denied on exercising basic rights of free speech in a completely legitimate manner. In the domain of the indispensable liberties, abridgement of such rights, even though unintended, may inevitably follow varied forms of governmental action. Cf. *National Ass'n for Adv. of Col. People v. Alabama*, and cases there cited; 78 S. Ct. 1163; 1171, June 30, 1958.

And it is now clear that a denial of a tax exemption or deduction may be as much a denial of free speech as direct action; *Speiser v. Randall*, 78 S. Ct. 1332, 1338; June 30, 1958. This Court said:

"It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean v. American Press Co.*, 297 U.S. 233. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty' its denial may not infringe speech."

It would seem to follow that, if, as we have postulated, the deduction is otherwise allowable, the denial of the deduction based on the character of the speech in effect amounts to an unconstitutional penalty exacted on its exercise.

It is not contended that Congress could not repeal the statute allowing business deductions; at least, we assume that it could. Likewise, California could not be compelled to grant a property tax exemption to veterans and churches; but once it did grant the exemption, it could not exclude those veterans and churches which refused to sign non-communist affidavits. *Speiser v. Randall*, *supra*. Similarly, to permit the dentist the right to deduct the expenses of saving his business, to permit other taxpayers the right to deduct similar expenses of preserving their business, but to deny this taxpayer the right to that very same deduction because of what he says, clearly amounts to a discriminatory denial of a deduction because and only because of engaging in speech. What difference, in-

deed, is there in taxing this petitioner for advocating the defeat of this proposal, cf. *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L. Ed. 660 (1936), and in withholding a deduction, *otherwise available*, because of such advocacy?

But whether the construction sought by the respondent would violate the right of free speech and petition of the First Amendment need not be here decided. It need only be recognized that to construe it as all embracing, as covering the exercise of the most sovereign rights possessed by a free people, seriously raises those constitutional spectres. It is fundamental that the construction, if at all fairly possible, must be such as to avoid the constitutional pitfalls. *U. S. v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 408, 53 L. Ed. 836; 29 S. Ct. 527; *U. S. v. C. I. O.*, 335 U.S. 106, 120, 121; 92 L. Ed.; 1849, 1860, 1861, 68 S. Ct. 1349; *U. S. v. Rumely*, *supra*; *U. S. v. Harris*, *supra*.

"Lobbying" and "propaganda", as used in the Regulation seem to imply something sinister or pernicious, or to suggest illegal or unethical activities. Cf. *Los Angeles & Salt Lake Railroad*, page 118, *infra*, and *Lucas v. Wofford*, *infra*. Similarly "promotion" or "defeat" of "legislation", as pointed out, normally would seem to have reference to attempted influence of acts by legislators, or at least to attempted influence of some type subject to the possibility of corruption or impropriety. After all, the regulation is attempting to define what is "necessary". It is difficult to conceive that something which is otherwise appropriate and helpful to the conduct of a business becomes not "necessary" merely because it is an attempt to influence legislation—at least, unless it borders on the illegal, and therefore was not "necessary". Cf. *Tank Truck Rentals*, *supra*, and *Comm. v. Sullivan*, 2 L. Ed. (2d) 559. It would accord-

ingly seem that such phraseology in the regulation would not ordinarily have reference to legitimate expenditures, completely free of taint from law or morals, openly advocating defeat of laws initiated and passed on by the people as a whole. Certainly so to interpret it is "not barred by intellectual honesty". Certainly, so to interpret it is in "the candid service of avoiding" serious constitutional doubt as to its validity; *U. S. v. Rumely*, *supra*, page 47.

(B) *The Regulation involved is invalid as applied to the facts of this case.*

This case, simply stated, represents the attempt of a taxpayer to defend his business against destruction. So long as he goes about such defense in a legitimate manner, no more necessary course of conduct can be conceived. By hypothesis, under the statute, such expense is both "ordinary" and "necessary". There is no logic nor reason in the regulation which says this is not so merely because such expense is an expense of influencing legislation.

The Regulation, in thus attempting to disallow a deduction otherwise clearly allowable under the Statute, is, to that extent, invalid as an improper extension of the Statute, *Bingham Trust Company v. Comm.*, 325 U.S. 365, 377, 89 L. Ed. 1670; Cf., *M. E. Blatt Co. v. U. S.*, 305 U.S. 267, 279, 83 L. Ed. 167, 172, (1938); *Miller v. U. S.*, 294 U.S. 435, 440; 79 L. Ed. 977 (1935); *Newman v. Comm.*, 76 Fed. (2d) 449, 452 (C.C.A. 5th), cert. den. 296 U.S. 600, 80 L. Ed. 425, unless its validity is either supported by the so-called re-enactment rule, or the holding of this Court in *Textile Mills Corp. v. Comm.*, 314 U.S. 326, 86 L. Ed. 249 (1941).

It was on both of these supports that the Court below rested its decision. We respectfully submit that the Court erred.

(1) Textile Mills upheld the validity of the Regulation only as applied to situations of doubtful legality or morality."

It was our position below—and is our position here—that the thrust of that decision was limited to activities illegal or contrary to public policy. The Court below, however, adopted the theory, as urged by Respondent, that Textile Mills sustained the validity of the Regulation in its entirety.

In the Textile Mills case, the property of certain German companies had been seized during World War I. The taxpayer, a corporation, was employed to procure remedial legislation on a contingent fee contract. The taxpayer was to bear all expenses of the attempt. As a result of the efforts of the taxpayer in 1928, legislation (the Settlement of War Claims Act of 1928, 45 Stats. 791) was passed restoring the property to the German owners. The taxpayer corporation was paid its fee. It claimed deduction for the amount paid to its publicists and two lawyers employed by it. The Commissioner disallowed the deduction and this Court sustained the disallowance. The Regulation involved was the same as the one here involved. This Court held:

"Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. *Contracts to spread such insidious influences through legislative halls have long been condemned. Trist v. Child (Burke v. Child), 21 Wall. (U.S.); Hazelton v. Sheckells, 202 U.S. 71, 50 L. Ed. 939, 26 S. Ct. 567, 6 Ann. Cas. 217. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disre-*

garded by the rule-making authority in its segregation of non-deductible expenses. *There is no reason why, in the absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from the family of contracts to which the law has given no sanction. The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn*" (emphasis supplied).

Petitioner recognizes that, with a minor exception not worth noting, there was no insidious activity on the part of the taxpayer in that case. But it was not what was actually done which brought public policy into play; it was what *might* have been done under the contingent contracts to procure favorable legislation. *It was the contracts in the Textile Mills case that were void as against public policy, not what was actually done under them. It was this fact that cast a shadow on the expenses thereunder.*

The opinion of the Third Circuit in the Textile Mills case, 117 Fed. (2d) 62, makes clear that it was what might have been done, and not what was done that caused the contracts to be null and void, stating:

"The contracts between the taxpayer and its clients were to procure 'favor legislation' as distinguished from 'debt legislation'. See the cases cited, page 229 of 78 Fed. (2d), note 7 to Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H., supra. Compensation for procuring the legislation was upon a contingent basis. In the light of both of these considerations, the contracts were null and void. The services performed by the taxpayer and its agents were rendered without suggestion of

corruption and, with the exception hereinafter referred to, were not unethical, but as was stated in *Hazelton v. Sheckells*, 202 U.S. 71, 79, 26 S. Ct. 567, 568, 50 L. Ed. 939, 6 Ann. Cas. 217, 'the objection to them rests in their tendency, not in what was done in the particular case.' Such contracts as were here made possess a tendency unduly to influence legislative action and to destroy the integrity of legislative institutions" (emphasis supplied).

The Court specifically pointed out that the contracts for allegedly procuring the very legislation involved in the Textile Mills had been held in two other cases to be invalid as against public policy; *Gesellschaft Fur Drahtlose Telegraphie M. B. H. v. Brown*, 64 App. D. C. 357, 78 Fed. (2d) 410, and *Brown v. Gesellschaft Fur Drahtlose Telegraphie M. B. H.*, 70 App. D. C. 94, 104 Fed. (2d) 227, certiorari denied 307 U.S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521.

Long prior to Textile Mills contingent contracts to obtain legislative results had been ruled void as against public policy. *Crocker v. U. S.*, 240 U.S. 74, 79; 60 L. Ed. 533, 537; *Hazelton v. Sheckells*, 202 U.S. 71, 79; 50 L. Ed. 939, 941.

Whether the contracts were void, as contended, is not important. *What is important is the fact that they at least were of dubious validity.* This Court specifically pointed out in its opinion that it did not need to decide whether the contracts involved specifically came within such rules, because there was clearly the general policy indicated by such cases and there was no reason why:

"... the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from the family of contracts to which the law has given no sanction . . . the general policy being clear it is

not for us to say the line was too strictly drawn"
(emphasis supplied).

That this is the underlying rationale and the very essence of this decision is emphasized by the reference of this Court to *Textile Mills in the Tank Truck Rentals, Inc. v. Comm., supra*, as upholding "the validity of an income tax regulation reflecting an administrative distinction 'between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction.' "

To construe *Textile Mills* as upholding the validity of the Regulation as applied to the instant situation, where there has not been the slightest question of public morals, ethics or policy involved, is to extend it far beyond its own wording, and to disregard cardinal rules of judicial interpretation that decisions are to be construed in light of their underlying facts.

(2) *The "Re-enactment Rule" does not sustain the validity of the Regulation.*

At this point—if our argument shall have found favor—we have for consideration an expense which would customarily be regarded as both factually and legally ordinary and necessary, one not violative of any law or any public policy, ethics or morals, and certainly not violative of any public policy evidenced by governmental declaration thereof; and we have the Regulation involved upheld as valid by this Court only as applied to lobbying or legislative promotional efforts in some way violative of public law or morals. The Commissioner can here fall back in supporting his version of the regulation only upon the flimsy doctrine of "re-enactment", which is, at best, a mere aid in statutory construction; *Helvering v. Reynolds*, 313 U.S. 428, 432; 85, L. Ed. 1438, 1441 (1941); *F. W. Woolworth v. U. S.*, 91 Fed. (2d) 913; and an "un-

reliable indicium" at that; *Comm. v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 99 L. Ed. 483, 490, 75 S. Ct. 483 (1955).

The "Re-enactment Rule" is neither applicable nor persuasive. If the re-enactment rule has any applicability, it would tend to sustain Petitioner's position rather than defeat it.

That doctrine, in effect, says that where there has been well settled and long continued judicial or administrative interpretation of a statute, by re-enactment of the statute Congress has given such interpretation its blessing. *U. S. v. Dakota-Montana Oil Company, infra*; *McGaughan v. Hershey Chocolate Company, infra*. By its own terms such a fiction cannot apply unless the interpretation is well settled and of long standing. We shall see that, if there was any well settled interpretation prior to 1939 (the last re-enactment before the year in question), it was not in accord with petitioner's position. We shall further see that after 1939 and prior to 1950, the year involved, there was no re-enactment, unless it could be said that by silence Congress impliedly approved the doctrine of Textile Mills (disregarding, at this point, *arguendo*, the effect of *Luther Ely Smith, infra*.) Any fictional sanction by Congress, however, of Textile Mills, is necessarily limited to its exact holding — and that case, as we have urged, did not approve the validity of the regulation as applied to this type situation.

Let us be more specific.

It is true that the regulation involved has as of today been in effect for over forty years. The first Regulation, which derived from a Treasury decision of 1915 (TD 2137 17 Treas. Dec. J.R., page 48, 57-58) was incorporated in the Regulations of 1918 (Article 143, Regulation 33, Revised). Between 1918 and 1939, when

Revenue Acts were customarily re-enacted in their entirety at intervals, there were at least nine substantial re-enactments.*

During this period there were many decisions generally allowing expenses connected with the promotion or defeat of legislation, provided they were legitimate expenses and were otherwise ordinary and necessary. In *Lucas v. Wofford*, 49 Fed. (2d) 1027, (5th Cir., 1931), the taxpayer sold a motor fuel known as Woco Pep. The Legislature met to prescribe fuel standards which Woco Pep obviously did not meet. The expense of employment of an attorney to forestall adverse legislation was held deductible, even though the attorney drafted a bill exempting Woco Pep, and appeared before the Governor, the Attorney General, and several legislative committees in explaining and advocating it. The bill exempting Woco Pep was passed. The Board of Tax Appeals had allowed the deduction (15 B.T.A. 1225), noting that the expense was made "in order to keep his business alive" and the services rendered "entirely legitimate". The Court of Appeals affirmed, holding the expenses were both legitimate and necessary to protect the taxpayer's business.

See also *George Ringler & Co.*, 10 B.T.A. 1134 (1928), allowing contributions to a brewer's association, made not only to test the constitutionality of the prohibition amendment, but also to campaign against assertions by the Anti-Saloon League that brewers were wasting food products.

In *Los Angeles & Salt Lake Railroad Company*, 18 B.T.A. 168 (1929), a contribution by the tax payer to an association, which, by advertising, (as contrasted to "lob-

*The following Revenue Acts, all enacted between 1918 and 1939, contain complete income tax provisions, represented the entire tax for the period covered: Rev. Act of 1918, Rev. Act of 1921, Rev. Act of 1924, Rev. Act of 1926, Rev. Act of 1928, Rev. Act of 1932, Rev. Act of 1934, Rev. Act of 1936, Rev. Act of 1938.

bying'') attempted to create favorable public opinion and understanding so as to avert unfavorable or injurious legislation when returning the railroads to private ownership after World War I, was held deductible—the regulation to the contrary—as made for a legitimate purpose vitally connected with the welfare of Petitioner's business, and made “*in a legal and ethical manner*”.

The Commissioner specifically urged the regulation, but the Court said:

“It is clear that the purpose of the advertising and publicity campaign conducted by the association was to create a body of intelligent public opinion favorable to the railroads of the country, and to *avert the enactment of legislation unfavorable or injurious to them*. The campaign was made by carrying in the newspapers of the country a series of advertisements setting forth the services rendered by the railroads, the problems confronting them, and *suggesting sound legislation and wise regulation* (p. 177). . . .”

After reviewing *Lucas v. Wofford* and *Geo. Ringler & Co.*, both *supra*, the Court held:

“We are unable to perceive any vital difference between the situations in the cases cited and that which gives rise to the present inquiry. There is no difference in principle between an expenditure of money to invalidate legislation already enacted and an expenditure to avert or forestall the enactment of legislation, *assuming that in each instance the means or methods employed are legitimate*. Nor do we see any distinction between an undertaking by an individual or corporation to avert or defeat, by direct action, legislation unfavorable to or destructive of his or its business, as in the *Wofford* case, and a joint undertaking by a number of individuals or corporations to avert or defeat, by indirect action, legislation unfavorable to or destructive of

their business. We are of the opinion that the expenditure in question was for a legitimate purpose vitally connected with the welfare and for the benefit of the petitioner's business, that it was made in a legal and ethical manner, and that it was an ordinary and necessary expense of the petitioner's business within the meaning of the revenue act then in force and should be allowed as a deduction from gross income" (p. 179) (emphasis supplied).

The Court of Claims in the case of *Texas & Pacific Railway Co. v. United States*, 52 Fed. (2d) 1040 (Court of Claims, 1931), affirmed on other issues, 286 U.S. 295, (1932), involved the identical issue for the same year for another railroad, and it likewise, the Regulation to the contrary notwithstanding, allowed the deduction. These and similar cases are typical of the climate of judicial opinion in the period between 1918 and 1939. *Kansas City Southern Ry. Co., et al*, 22 B.T.A. 949, 963 (1931), *reversed on other grounds*, 75 Fed. (2d) 786 (8th Cir. 1935), *remanded on second appeal*, 109 Fed. (2d) 1018 (1940); *Missouri Pacific Railroad Co.*, 22 B.T.A. 267, 287 (1931); *Norfolk Southern Railroad Co.*, 22 B.T.A. 302, 309 (1931), *reversed in part and affirmed in part on other grounds*, 63 Fed. (2d) 304 (4th Cir. 1933), cert. denied 290 U.S. 672 (1933); See also, after 1939, *Addressograph-Multi-graph Corp.*, P-H T. C. Memo Decision, para. 45,058 (1945).

The case of *Sunset Scavenger Company, Inc. v. Comm.*, 84 Fed. (2d) 453, (1936), was thus not indicative of the majority rule at that time. As a matter of fact, the lower court in the *Textile Mills* case itself refused to be guided by the *Scavenger* case, 38 B.T.A. 623 (1928), but referred approvingly to *Lucas v. Wofford*, *supra*, and held to apply the Regulation as contended by the Commissioner would be an invalid misapplication of the statute.

After the Internal Revenue Code was adopted in 1939,* there was no further re-enactment of the entire statute, as had been formerly done. Changes in the law were effected by amendment of a particular section.

Textile Mills was decided in 1941.

In 1944 the Tax Court decided the case of *Luther Ely Smith*, 3 T.C. 696, involving an amendment to the Constitution by initiative petition, holding that the regulation here involved did not apply since there was no legislation, as previously noted. The Commissioner acquiesced, 1944 Cum. Bull. 26.** With the flexibility of afterthought not afforded most litigants, this acquiescence was finally withdrawn (Rev. Rule 58-255, 1958 Int. Rev. Bull. No. 21, at 16) after certiorari had been granted in the companion case to the one at bar, *Cammarano v. U. S.*, 246 Fed. (2d) 751, cert. granted, 2 L. Ed. (2d) 521.

Between 1939 and 1950, the year here involved, there has been, of course, no re-enactment of Section 23 (a) (1).†

Thus it seems clear that the only true re-enactment of this section of the tax law was made during the period 1918-1939, when the majority of the decisions were holding specifically‡ that the Regulation did not prevent deduction of expenses made to invalidate legislation or avert future enactments, even though carried on directly through contact with representatives of

*The 1939 Code has itself been regarded only as a compilation, not a re-enactment. *Helvering v. Hallock*, 309 U.S. 106, 84 L. Ed. 654, 60 S. Ct. 444, (1940), Note 4.

**If there be a difference between expenses to defeat a state constitutional amendment to be enacted by the people and an initiative measure to be enacted by the people, we are unable to perceive it.

†There was a minor change to the heading of Section 23 (a) (1) pursuant to Section 121 (a) of the 1942 Revenue Act, 1956 Stats. 819, 1942.

‡C* also *Sanford v. Comm.*, 308 U.S. 39, 84 L. Ed. 20 (1939), where the administrative interpretation was in conflict with lower court decisions and see annotation at 84 L. Ed. 55.

the Legislature, so long as they were done in a legitimate and ethical manner. This being so, the various re-enactments should be deemed to have approved this judicial interpretation. But, at the very best, it cannot be said that there was any settled judicial construction of the Regulation, and as here indicated, it has not been re-enacted since. As we have indicated, the doctrine can apply only when the judicial or administrative construction is settled and long continued; *McGaughan v. Hershey Chocolate Co.*, 283 U.S. 488, 492; 75 L. Ed. 1183; *U. S. v. Dakota-Montana Oil Co.*, 288 U.S. 459, 466, 77 L. Ed. 893, 897; *Helvering v. Winmill*, 305 U.S. 79, 83, 8 L. Ed. 53. Unless the interpretation is settled, there is no reason to apply the rule. *Merten's Law of Federal Income Taxation*, Zimmet, Stanley and K. T. Culler Revision (1957), 54, Sec. 323.*

Further, the re-enactment rule can logically apply only when the regulation construing the statute is clear and unambiguous. Ambiguous regulations are of little value in resolving statutory ambiguities, *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 76 L. Ed. 587, 52 S. Ct. 275. At least until recently, *Revere Racing Ass'n v. Scanlon*, 232 F.(2) 816 (1 Cir.) (1956) and *Davis, Herbert*, 26 T.C. 49 (1956), long after the year in question (and even after the enactment of the 1954 Code), no case or ruling had ever specifically applied the regulation to legitimate expenses of influencing enactments made directly by the people. Indeed, the inference of Luther Ely Smith, *supra*, and the Commissioner's acquiescence therein, is to the contrary. Just what meaning the Congress may have thought it was re-enacting, with reference to the present situation, whether before or after Textile Mills, is not easy to understand.

*As to the overall unreliability of this rule, see Merten's comments in this section and also in 3.24.

Between 1939 and 1950, the year under controversy, there has been no re-enactment. Thus, any further judicial construction during this period is not properly incorporated under the re-enactment rule. In this connection see footnote 7 to a decision of this Court, *Helvering v. Hallock*, 309 U.S. 106 (1940), where this Court said:

“Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that *doctrine has no relevance to the present problem*. Since the decisions in * * *, Congress has not re-enacted § 302 (c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without re-enacting § 302 (c). * * *”

The Court below suggested the re-enactment rule was applicable in a different sense; it felt that the Congress had acquiesced, through long silence—an approach on its face being more fraught with weakness, being, as it is, yet one further step removed from the doctrine of formal re-enactment. “We walk on quicksand when we try to find in the absence of corrective legislation, a controlling legal principle.” *Helvering v. Hallock*, *supra*.

But if there be re-enactment here, whether by express re-enactment or by acquiescence, it seems that the re-enactment should in all events re-enact the ruling of *Textile Mills* as qualified and distinguished in *Luther Ely Smith*, *supra*, and acquiesced in by the Commissioner, his belated withdrawal to the contrary notwithstanding.

Above all, whether or not we consider the *Smith* case as modifying *Textile Mills*, or having any bearing whatsoever, the doctrine of re-enactment, whether of express re-enactment or re-enactment by acquiescence or silence, of necessity must be bound up inextricably with the true

meaning of Textile Mills. That is to say, even if the tax year here involved were 1955, so that we clearly had an express re-enactment since the decision in 1941, still it must inevitably follow that such re-enactment could incorporate and approve neither more nor less than the precise holding of Textile Mills. If Textile Mills, as we have urged, upheld the validity of the Regulation only as applied to items of doubtful morality or legality, then we are at a loss to explain how Congress could have by mere re-enactment imposed a more extended interpretation of the Regulation. On the other hand, if, as is the position of the Government, Textile Mills upheld the validity of the Regulation in its entirety and as applied to every type of lobbying or legislative expenses, legitimate or not, the resolution of the question of re-enactment becomes academic to this case, for we shall have already been foreclosed by the meaning of Textile Mills.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 provides in pertinent part as follows:

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or Business Expenses.

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

2. Section 29.23 (q)-1, of Treasury Regulation 111, as it existed during 1950, provided as follows:

"Contributions or gifts by corporations. — A corporation may deduct from its gross income contributions or gifts to organizations described in section 23 (q) (see section 29.22 (b) (4)-1 for definition of 'political subdivision'). Where payment is made in a taxable year beginning prior to the first taxable year beginning after the date of the cessation of hostilities in the present war, as proclaimed by the President, the charitable deduction prescribed is allowable to corporations even though the gifts or contributions are used outside of the United States or its possessions. Such deductions shall, to the extent provided by that section, be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23 (a), see section 29.23 (a)-13. Sums of money expended for

lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

"The provisions of the last paragraph of section 29.23 (o)-1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporation under section 23 (q)."

3. Amendment No. 7 to the Constitution of Arkansas, approved in the General Election November 20, 1920, provides in pertinent part as follows:

"No. 7. Initiative and Referendum

Sec. 1. Legislative power. — The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures; laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill. . . ."

"State Wide Petitions

Initiative—The first power reserved by the people is the initiative. Eight percent of the legal voters may propose any law and ten per cent may propose a Constitutional Amendment by initiative

petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for Statewide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing, the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation. . . .”

“General Provisions

Definition—The word “measure” as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character.

No Veto—The veto power of the Governor or Mayor shall not extend to measures initiated by or referred to the people.

Amendment and Repeal—No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the City Council, as the case may be.

Election—All measures initiated by the people, whether for the State, county, city or town, shall be submitted only at the regular elections, either State, congressional or municipal, but referendum petitions may be referred to the people at special elections to be called by the proper official, and such special election shall be called when fifteen per cent of the legal voters shall petition for such special election, and if the referendum is invoked as to any measure passed by a city or town council, such city or town council may order a special election.

Majority—Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such elections. Such measures shall be operative on and after the 30th day after the election at which it is approved, unless otherwise specified in the act. This section shall not be construed to deprive any member of the General Assembly of the right to introduce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution. . . .”

“ . . . **Self-Executing**—This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people. . . .”

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In the Supreme Court of the United States

OCTOBER TERM, 1957

F. STRAUSS & SON, INC., OF ARKANSAS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 928

F. STRAUSS & SON, INC., OF ARKANSAS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit

MEMORANDUM FOR THE RESPONDENT

The question presented is whether amounts expended by taxpayer in an effort to defeat proposed initiative legislation in the State of Arkansas are deductible as "ordinary and necessary" business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939. The court below held that these amounts were not deductible because expended for the purpose of promoting or defeating legislation.

We believe that this decision is correct. The question presented, however, is substantially the same as

that presented in *Cammarano v. United States*, No. 718, this Term, in which this Court granted certiorari, 355 U.S. 952. Consequently, the Commissioner does not oppose the grant of certiorari here. In the event that the writ is granted, it is suggested that this case be consolidated for argument with *Cammarano v. United States, supra*, under Rule 43(5).

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

MAY 1958.

AUG 18 1958

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

F. STRAUSS & SON, INC.,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 50.

Brief of Bay Cities Transportation Company Amicus Curiae

On Certiorari to Review a Decision of the United States Court of Appeals
for the Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

F. STRAUSS & SON, INC.,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 50

Brief of Bay Cities Transportation Company Amicus Curiae

On Certiorari to Review a Decision of the United States Court of Appeals
for the Eighth Circuit.

STATEMENT OF INTEREST OF AMICUS CURIAE

This amicus curiae is plaintiff in a suit for refund of federal income taxes now pending in the United States Court of Claims and entitled *Bay Cities Transportation Company v. United States of America*.¹ Its interest in these proceedings derives from the pendency of that suit, which involves the question whether expenditures relating to an initiative amendment to the California constitution, voted on by the electorate, are deductible as ordinary and necessary business expenses.

1. Docket No. 282-57.

SUMMARY OF ARGUMENT

First: Section 23(a)(1)(A) of the 1939 Internal Revenue Code allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". The aim of the statutory provision is to confine the burden of the income tax to "net income", that is, gross income *after* deducting "the ordinary and necessary expenses incurred in efforts to obtain or to keep it". *McDonald v. Commissioner*, 323 U.S. 57, 67 (1944). If it does this, and does it well, it has accomplished enough for one law. If it departs from this primary objective, it has failed in its purpose.

Second: The expense in the instant case was not illegal. Neither did it violate or frustrate any public policies—much less "national or state policies evidenced by some governmental declaration" thereof. *Lilly v. Commissioner*, 343 U.S. 90, 97 (1952); *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33 (1958); *Commissioner v. Sullivan*, 356 U.S. 27 (1958).

Petitioner was defending its very existence. It campaigned against a ballot measure in a perfectly forthright, open and legal manner, in keeping with the statutes and policies of the State of Arkansas. In modern society, the effective exercise of the right to engage in public debate costs money. To espouse the right, but to condemn the expenditure of funds for its effective exercise is mere cant. This Court has held that an expense incurred to preserve a business from destruction is an ordinary and necessary business expense. *Commissioner v. Heininger*, 320 U.S. 467 (1943). The fact that the attack on petitioner's business came by way of an initiative measure does not make resistance to it any the less "ordinary" or "necessary"; and the Commissioner should not, merely because an initiative

measure is involved, inject new standards of deductibility, foreign not only to the tax law but to the statutes and policies of the State of Arkansas.

Third: The expense does not fall within the ambit of the Commissioner's regulation disallowing expenditures "for lobbying purposes, the promotion or defeat of legislation". Regs. 111, Sec. 29.23(q)-1. This regulation, on its face, is a severe limitation on the statutory words "ordinary and necessary"—a limitation which can only be justified by giving to the regulation a restrained construction compatible with the declared policies of Congress and the states which relate to lobbying and legislative matters. The Commissioner and the courts have long recognized that the regulation is directed at expenditures which violate established policies regarding lobbying and legislative activities. For example, this Court has approved the application of the regulation to disallow expenditures under a *contingent fee lobbying contract*. *Textile Mills Corp. v. Commissioner*, 314 U.S. 326 (1941). In that case this Court pointed out that the Commissioner may, by regulation, appropriately draw a line "between *legitimate* business expenses" and those which violate the "general policy [on legislative expenses] indicated by" cases such as *Trist v. Child*, 21 Wall. (U.S.) 441, and *Hazelton v. Sheckells*, 202 U.S. 71 (holding that "contracts for a contingent compensation for obtaining legislation were void", 202 U.S. at 79). This Court further observed that a valid regulation could not "contravene(d) any Congressional policy", and pointed out that at that time (1941) there had been no "clear Congressional action" on the subject of legislative activities. After the *Textile Mills* decision, the "general policy" on lobbying and legislative activities was spelled out by "clear Congressional action" in the Federal Regulation of Lobbying Act, 60 Stat. 839 (1946), 2 U.S.C. §§ 261-70 (1952).

In line with the reasoning in the *Textile Mills* decision, the regulation should be interpreted to accord with the "general policy" on legislative expenditures now expressed in this Act *as well as* in the decided cases such as *Hazelton v. Sheckells, supra*. This does *not* mean any *relaxation* in the conditions of deductibility. Rather it means that an expenditure must comply *both* with the "general policy" of *Hazelton v. Sheckells* and with the disclosure requirements and other safeguards of the Federal Regulation of Lobbying Act. This construction will put additional teeth into the latter Act. Similarly, the regulation should complement, and not conflict with, *declared state policies* where state enactments are involved. In particular, the regulation should be interpreted to accord with *declared state policies* relating to expenditures for *initiative* measures such as those here made.

In a word: the situation with respect to lobbying and legislative expenses is not unlike that with respect to "penalties"; and the incisive observations made by Judge Learned Hand in *Jerry Rossman Corporation v. Commissioner*, 175 F.2d 711, 713 (2d Cir. 1949), are peculiarly apt. In that case Judge Hand, speaking for the court, held that the "penalties" for OPA overcharges there involved were deductible, reasoning as follows:

"The Revenue Act does not declare that penalties may not be deducted; *the doctrine is a judicial gloss* * * * We agree that it is a proper gloss. * * * Hence, if one rigorously applied the doctrine, a taxpayer could never deduct the payment of fines and forfeitures; * * * The Supreme Court overruled this doctrine in *Commissioner v. Heininger, supra*; * * * We think that * * * *there are 'penalties' and 'penalties,' and that some are deductible and some are not.* * * * *We hold therefore that in every case the question must be decided ad hoc.*"

To the same effect see *Tank Truck Rentals, Inc. v. Commissioner, supra*; *Commissioner v. Sullivan, supra*; *Commissioner v. Pacific Mills*, 207 F.2d 177 (1st Cir. 1953).

So it is with the instant regulation. We suggest that there are "lobbying" expenses and "lobbying" expenses; that there are "expenses for the promotion or defeat of legislation" and "expenses for the promotion or defeat of legislation"; and some are deductible and some are not. In every case the question "must be decided *ad hoc*". The test we submit is whether the "lobbying" or the activities for "the promotion or defeat of legislation" in the particular case "frustrate sharply defined" or "governmentally declared" policies. Moreover, the Commissioner may not fashion an all-embracing regulation and then defend it on the ground that the regulation itself constitutes a declared public policy. Such reasoning would make a farce of the "public policy" tax doctrine. In sum: *the tax regulation should be read in the light of the declared federal policies which exist with respect to lobbying and legislative activities; and, similarly, it should be read in the light of declared state policies which exist with respect to initiative measures.*

Fourth: If the re-enactment rule has any significance, it supports the position of petitioner in this case.

ARGUMENT

- I. **The Contribution Is Deductible as an Ordinary and Necessary Business Expense. It Was Not Illegal. It Frustrated No Public Policies.**

Section 23 of the Internal Revenue Code of 1939 permits deduction from gross income of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *".

The purpose of the statute is to determine a "net income" upon which the tax may be levied; and the section specifies its own criteria of deductibility. The outlay must be a "business expense"; it must be "ordinary"; and it must be "necessary". The statute provides no less and no more. It calls for an empirical approach.

The only gloss which the courts have imposed on the meaning of the statutory words has been cast in terms of "illegality" or "public policy". For example, it has been held that expenditures which are *illegal* are not deductible. *Boyle, Flagg & Seaman, Inc.*, 25 T.C. 43 (1955); *R.E.L. Finley*, 27 T.C. 413 (1956); *Lorraine Corporation*, 33 B.T.A. 1158 (1936); *Kelley-Dempsey & Company*, 31 B.T.A. 351 (1934). Similarly, deductions which frustrate the policy of other laws are not allowable. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958).

No such problem exists in the present case. Expenditures by persons interested in ballot measures are not only countenanced in Arkansas; they are contemplated. The state statutes do not prohibit expenditures in behalf of or in opposition to ballot proposals. On the contrary, the assumption is that such expenditures *will be made*, and the statutes merely limit the amount which may be expended by protagonists of the ballot measure and require that such persons file with the Secretary of State an account of their expenditures. Ark. Stat. Ann., Sec. 3-1303 (1947); see also Arkansas State Constitution, Amendment 7, Section 1.

It is thus apparent that the expenditure of funds by plaintiff and others similarly situated to disseminate their views on a proposed initiative being submitted to the general electorate did not violate any "sharply defined" or "governmentally declared" policy of the State of Arkansas. The boundaries of permissible activity in respect of ballot

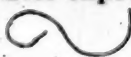
proposals having been delineated by statute in Arkansas, it is not for the Commissioner to redraft these boundaries to suit some vague notions of public policy nowhere defined.

It may be said that petitioner was interested in disseminating facts favorable to only one side of the measure; that to permit deduction creates an indirect subsidy to this side. But there were no doubt others on the opposite side, as in most questions which are the subject of public debate. The expenditures on either side may be "good" or "bad", depending on the point of view. Who is to say whether the money is being spent to "propagandize" the public or to "educate" the public? Whether the campaign is to "bring out the facts" or "obfuscate the issue"?

In fashioning the taxing statute, Congress very wisely avoided these side issues. Under the tax law the question is cast in terms of whether the expenditure is "personal" (and therefore nondeductible) or "business" (and therefore deductible). In addition, it must be "*ordinary*"; it must be "*necessary*"; it must not be *illegal*;¹ and it must not frustrate *declared public policies*.

Further than this the courts should not go in trying to shape public conduct through use of the tax statute. In particular, the courts should not construe the tax statute so as to *condemn* conduct which is *expressly sanctioned* by the declared public policies of the state.

1. It may be noted in passing that expenditures by corporations for political purposes and the like are either prohibited or carefully controlled by statutes such as the Federal Corrupt Practices Act, 43 Stat. 1070 (1925), as amended 2 U.S.C. §§ 241-56 (1952) [the portion here relevant is now codified as positive law in 18 U.S.C. § 610 (1952)] and the Hatch Act, 53 Stat. 1147 (1939), as amended 5 U.S.C. § 118-n; 18 U.S.C. §§ 594-611 (1952). The tax regulation should, of course, be construed to backstop these direct statutory provisions. But it should not go beyond this to *condemn* activities which the declared policy of such statutes expressly *sanctions*.



II. Deduction of the Expenditures Is Not Barred by the Commissioner's Regulation.

For many years the income tax regulations have contained the following provision:

"Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income." Regs. 111, Sec. 29.23(q)-1.

Respondent apparently contends that this regulation bars deduction of the expenses here involved. We maintain it is not applicable for two reasons: (a) The regulation is not applicable by its terms; and (b) The scope of the regulation should not be expanded by inference.

(a) The Regulation Is Not Applicable by Its Terms.

The scope of the regulation ought in the first place to depend on the words used. The fact is that the money here involved was not "expended for lobbying purposes". The content of the word "lobbying" may have some flexibility, but it certainly does not encompass the kind of general publicity program addressed to the voters at large which was carried on in this case. See *United States v. Rumely*, 345 U.S. 41, 47 (1953), in which this Court pointedly observed that the commonly accepted meaning of the word "lobbying" is "representations made directly to the Congress, its members, or its committees"; and that the meaning does not extend to a generalized publicity program designed to reach "the thinking of the community".

It is equally plain that the expenditure here involved was not for "the promotion or defeat of legislation". In the *Rumely* case, this Court indicated that the words "influence legislation" normally connote action directed at representa-

tive legislative bodies. The Commissioner has conceded as much by his public acquiescence in the case of *Luther Ely Smith*, 3 T.C. 696 (1944), acq. 1944 C.B. 26.¹ In the *Smith* case, a lawyer was allowed to deduct sums of money spent for the promotion of an *initiative amendment* to the state constitution which would have affected his profession. The court held the contribution deductible, saying:

"It should be noted that the institute engaged in *no lobbying* of any kind before any *legislative body*. No legislation was needed or involved in its plan. It contemplated an amendment to the constitution, proposed by the initiative of the people, voted upon at a general election, and becoming self-operative thirty days thereafter, *without the necessity of any action or approval by either the legislature or the governor.*" (p. 702)

The *Smith* case involved an *initiative constitutional amendment* while the instant case concerns an *initiative statutory measure*. This difference, however, is of little relevance. The Tax Court in the *Smith* case stated the grounds of its decision with clarity, i.e., that "No *legislation* was needed * * * the institute engaged in no lobbying of any kind before any *legislative body* * * * It contemplated an amendment * * * without * * * any action * * * by * * * the *legislature.*" It is impossible to perceive any basis in policy for a distinction between expenditures in respect of a constitutional amendment *voted on by the electorate* and expenditures in respect of a statutory measure *voted on by the electorate* which would justify allowance of a deduction in the one instance and denial in the other.

1. Fourteen years later—and after certiorari was granted in *Cammarano v. United States*, 246 F.2d 751 (9th Cir. 1957), cert. granted 355 U.S. 952, and on the same day that certiorari was granted in this case, 356 U.S. 966, the Commissioner withdrew his acquiescence. Rev. Rule 58-255, 1958 Int. Rev. Bull. No. 21, at 16. But this was not until after occurrence of all the material facts of this case and entry of the judgment below.

For fourteen years the standing of the *Smith* decision was beyond question. It was reviewed by the entire court. It was a unanimous decision. And it was "acquiesced" in by the Commissioner. The Internal Revenue Bulletin in which the Commissioner's acquiescence was published states that:

"In order that taxpayers and the general public may be informed whether the Commissioner has acquiesced in a decision of The Tax Court * * * announcement will be made in the semimonthly Internal Revenue Bulletin * * * *Decisions so acquiesced in should be relied upon * * * as precedents in the disposition of other cases.*"
(1944 C.B. page iv.)

Although the Commissioner has now belatedly withdrawn his acquiescence, it was in full force and effect for 14 years and at all times material to the issues of this case. At least during this 14-year period the Commissioner ought to be required to honor his *own* interpretation of his *own* regulation—an interpretation which is consistent with the decisions of this Court and the applicable federal and state policies.

In sum, the word "legislation" ordinarily refers to statutory enactments *by the legislature*. This normal construction accords with the apparent purpose of the regulation to insure that "insidious" lobbying arrangements will not operate in "*legislative halls*", *Textile Mills Corp. v. Comm'r*, 314 U.S. 326 (1941); and it accords with the Commissioner's own interpretation of his regulation.

(b) The Regulation Should Not Be Expanded by Inference.

It remains to be considered whether the regulation should be extended by inference to cover the expenditures here considered. In *Luther Ely Smith, supra*, The Tax Court decided not. By his published acquiescence the Commis-

sioner agreed. And there is ample reason for their restraint. The statute permits deduction of business expenses which are "ordinary and necessary". The Commissioner, by regulation, maintains that a business expense is not "ordinary and necessary" if it is for "the promotion or defeat of legislation". This is a *non sequitur*,¹ even before the meaning of the word "legislation" is extended to include

1. There is no policy justification for using the "meat-ax" approach to this class of expenditures. The many state and federal statutes *dealing selectively* with these activities bear witness to that. Political scientists, statesmen, and other writers have uniformly noted that activities for the promotion or defeat of legislation are not bad *per se*. On the contrary they are a necessary and beneficial aspect of a complex industrial society.

The observations of the late Senator Robert M. La Follette, Jr., author of the 1946 Legislative Reorganization Act (of which the Federal Regulation of Lobbying Act is a part), whose knowledge of and interest in this problem has been equaled by few people, are highly significant:

"Lobbying may be a pernicious evil at one extreme or an indispensable part of the legislative process at the other, depending on the circumstances and the methods of lobbyists. Few, if any, legislators could hold a brief for the avaricious, anti-social or unscrupulous tactics to which some special interests sometimes resort; but even fewer would be willing to abolish lobbying and cut off essential sources of information in exchange for 'protection' against the unscrupulous.

"Efforts to curb the abuses of lobbying have been directed generally at the objective of full disclosure of sponsorship and expenditures. The force of public opinion, it is reasoned, will then be brought to bear on its abuses. That is the theory too on which most of the state laws on lobbying have been based. Massachusetts passed the first lobbying law in 1890 and about thirty-five states now have such laws with varying provisions and varying degrees of enforcement.

"By and large, however, lobbying reflects the complexity of our society and Government. The bulk of it is a representation of viewpoints and interests which should be and are considered in the legislative process." *New York Times Magazine*, May 16, 1948, page 15.

Similar views are contained in the final report of the House Select Committee on Lobbying Activities, H. Rep. No. 3239, 81st Cong. 2d Sess., 1951, p. 4; "Labor on Capitol Hill", *Fortune Maga-*

initiative measures not acted on by the legislature. And this Court made it unmistakably plain in the *Textile Mills* case that the content of the regulation must not "contravene(d) any Congressional policy" and should take account of "Congressional action". Similarly, the regulation must be construed in a manner consistent with declared *state* policies relating to *state* initiative measures.

Arkansas has adopted its own canons of behavior in respect of direct popular sovereignty. Ark. Stat. Ann. §§ 3-1301—3-1313; Arkansas State Constitution, Amendment 7, Sec. 1. Here are the "state policies evidenced by some governmental declaration of them" to which this Court adverted in the *Lilly* case. The boundaries of permissible activity having been thus delineated, it is not for the *taxing* authority to *frustrate* such policies by affirmatively inflicting a penalty.

To paraphrase Judge Learned Hand:¹ there are "lobbying" expenses and "lobbying" expenses; there are "expenses for the promotion or defeat of legislation" and "expenses for the promotion or defeat of legislation"; and some are deductible and some are not. In every case the question "must be decided *ad hoc*". The test we submit is whether the "lobbying" or the activities for "the promotion or defeat of legislation" frustrate "sharply defined" and "governmentally declared" policies exemplified, for example, by the Federal Regulation of Lobbying Act or by state statutes governing conduct in legislative or initiative matters. The

zine, March 1949, Vol. 39, pp. 177-8; "Lawyers and Lobbyists", *Fortune Magazine*, February 1952, Vol. 45, pp. 127-8.

It may also be noted that Canon 26 of the Canons of Professional Ethics of the American Bar Association, 62 Reports of American Bar Association 1105, 1114, specifically approves the performance of proper lobbying and legislative services by attorneys.

1. *Jerry Rossman Corporation v. Commissioner*, 175 F.2d 711, 713 (2d Cir. 1949).

policy which the tax law should strive for is to determine "net income" fairly and accurately; and to do so without "frustrating" other laws or declared public policies. The Commissioner should not be permitted to use his tax regulations as an *independent* source of policy-making authority. In particular, there is no policy justification whatsoever for construing the Commissioner's regulation so as to *condemn* conduct *expressly sanctioned* by the declared policies of Arkansas.

III. The Re-enactment Rule Supports Petitioner's Contentions.

Criticism of the re-enactment rule has ranged all the way from the comment that "re-enactment * * * is an unreliable indicium at best", *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), to the suggestion of one recognized authority that "the mere re-enactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute". Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 400 (1941). See also Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes*, 88 U. Pa. L. Rev. 556 (1940).

We cite the foregoing authorities to make it clear that we are not interested in defending the re-enactment rule as a reliable indicium of statutory construction. We say only this: if the re-enactment rule has any significance, it supports the position of petitioner in this case.

First: The re-enactment rule cannot make an *invalid* regulation *valid*. "A regulation which does not carry into effect the will of Congress as expressed in the statute, and which operates to create a rule out of harmony with the statute, is 'a mere nullity'." *Studies in Federal Taxation*, p. 435 3d Series, Randolph E. Paul; *Koshland v. Helvering*, 298 U.S. 441 (1936).

Second: There is no provision in the tax law authorizing a specific regulation defining the terms "ordinary and necessary" and the only power of the Commissioner is the general power conferred by the Internal Revenue Code to make appropriate regulations. Int. Rev. Code 1939, Sec. 3791; *Koshland v. Helvering, supra*.

Third: *A priori*, there is nothing in the words "ordinary and necessary" which excludes expenses for the promotion or defeat of legislation. Consequently, the Commissioner's effort to import this limitation into the words must be given a reasonable construction by the courts to save it.

Fourth: As pointed out in petitioner's brief, the vast majority of the decisions construing the Commissioner's regulation in the period between 1918 and 1939, when the re-enactment rule may be said to have had some force, are in accord with the construction urged in this brief and that of petitioner.

If we are to attribute to Congress an intent to incorporate into the statute by re-enactment the developing content of the regulations through judicial interpretation, we should incorporate the full picture as Congress saw it. The full picture in 1950 includes a clear rule that the regulation does not bar deduction of *legitimate* expenditures in connection with *initiative* measures voted on by the *electorate*.

CONCLUSION

The states and Congress are at liberty to regulate activities in connection with the law-making process. Tax deduction rules should not violate these laws or frustrate the policies they foster. By parity of reasoning, the Commissioner's regulations are not an independent source of

policy-making authority which may *condemn* conduct expressly *sanctioned* by the declared policies of the state.

The expenses which petitioner incurred in this case were deductible as ordinary and necessary business expenses.

Respectfully submitted,

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